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No. __

IN THE
# Supreme Court of the United States

POOH BAH ENTERPRISES, INC.,
PETITIONER
v.
COUNTY OF COOK AND CITY OF CHICAGO,
RESPONDENTS

**On Petition for Writ of Certiorari to the Supreme Court of Illinois**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the government can evade strict First Amendment scrutiny of a content-based amusement tax exemption simply by characterizing the scheme as a "subsidy" of preferred private expression?

2. Whether the government can impose a differential amusement tax on expression based entirely on the content of performances without violating the First Amendment?

3. Whether the government can impose a differential amusement tax on expression based entirely on the arbitrary esthetic judgments of local officials?

## PARTIES TO THE PROCEEDINGS

The petitioner, plaintiff below, is Pooh Bah Enterprises, Inc., an Illinois corporation.

The respondents, defendants below, are the County of Cook, an Illinois County, and the City of Chicago, an Illinois municipal corporation.

## RULE 29.6 STATEMENT

Pooh Bah Enterprises, Inc., is a privately held corporation. None of its shares is held by a publicly traded company.

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## OPINIONS BELOW

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The Memorandum Decision and Judgment of the Circuit Court of Cook County, Illinois (Mar. 21, 2003) is included at App. A-91. Its Memorandum Decision and Judgment (Aug. 9, 2005) denying reconsideration is included at App. A-77.

## STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the Supreme Court of Illinois pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

United States Constitution, First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."

United States Constitution, Fourteenth Amendment:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

## ORDINANCES

The Ordinances involved in this case appear at Cook County Amusement Tax Ordinance §§ 2-3, and Municipal Code of Chicago §§ 4-156-010 and 4-156-020(A), (D)(1), (I), the pertinent text of all of which (and related provisions) is reproduced in the Appendix.

## STATEMENT

1. In 1993, Pooh Bah Enterprises, Inc. ("Pooh Bah") opened an adult entertainment club (the "Club") in the City of Chicago ("the City") in Cook County ("the County"), Illinois (collectively "Chicago"). The Club presents as live entertainment non-obscene exotic dancing, in which scantily clad (but not completely nude) women dance both onstage and for individual patrons. The Club is subject to virtually identical City and County taxes on "amusements," defined as "any exhibition, performance, presentation or show for entertainment purposes, including any theatrical, dramatic, musical or spectacular performance[.]" Cook County Amusement Tax Ordinance § 2; Chicago Municipal Code § 4-156-020(A) (2008).

2. Effective January 1, 1999, the City and County amended their respective amusement tax ordinances to add "small venue" exemptions for "live theatrical, live musical or other live cultural performances" in spaces with a maximum capacity of 750 people. Cook County Amusement Tax Ordinance § 3(D)(1); Chicago Municipal Code § 4-156-020 (the "Small Venue Exemption"). To qualify for the tax exemption, such performances must involve "disciplines ... commonly regarded as part of the fine arts, such as live theater, music, opera, drama, comedy, ballet, modern or traditional dance, [or] book or poetry readings." Cook County Amusement Tax Ordinance § 2; Chicago Municipal Code § 4-156-010.

The Small Venue Exemption specifically excludes "performances [] at adult entertainment cabarets" as defined by ordinance. The definition of "adult entertainment cabaret" is provided by cross-reference to the respective City and County zoning ordinances, which define such venues as any "establishment which features ... entertainers who ... [d]isplay or simulate the display of 'specified anatomical areas.'" Cook County Zoning Ordinance of 2001, art. 14.2.1. *See* Chicago Municipal Code § 16-16-030.

The County Small Venue Exemption's preamble recites that it reflects "the intent of the County Board to foster ... live performances that offer theatrical, musical or cultural enrichment to ... Cook County." Cook County Bd. of Comm'r's Resolution, Nov. 17, 1998, amending amusement tax ordinance. A City Council Journal entry on passage of its Small Venue Exemption similarly reflects the City's "wishes

to foster ... live performances that offer theatrical, musical or cultural enrichment[.]" Council Journal Entry, Nov. 12, 1998, amending § 4-156-020(D).

Pooh Bah claimed the Small Venue Exemption for the Club because its capacity is less than 750 patrons, and its featured entertainment includes "live theatrical, live musical, or other live cultural performances." The County denied the Club the Small Venue Exemption on grounds its dances are "performances conducted at adult entertainment cabarets." Pooh Bah has paid the tax under protest, and filed for refunds. (App. A-7, A-60.)

3. In 2001, Pooh Bah filed suit in Cook County Circuit Court seeking declaratory and injunctive relief against the County on grounds the Small Venue Exemption's exclusion of adult entertainment cabarets violates the First Amendment of the federal Constitution and the free speech clause of the Illinois Constitution. The City intervened as a party defendant because of the substantial similarity of its amusement tax exemption, and Pooh Bah amended the complaint to include constitutional claims against the City.[1] The City and County filed motions to dismiss, which the circuit court granted. Pooh Bah moved for reconsideration, which was denied. (App. A-8–A-10, A-77–A-114.)

On appeal, the Illinois Appellate Court reversed the circuit court decision on Pooh Bah's

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[1] (App. A-7–A-8.) As with the County, Pooh Bah has paid the City's amusement tax under protest, and has sought refunds.

facial First Amendment challenge. It held that the Small Venue Exemption's exclusion of adult entertainment cabarets was a content-based differential tax on exotic dance and that applicable U.S. Supreme Court precedents do not allow such discriminatory, content-based taxation. The Appellate Court applied this Court's speech-tax line of cases, including *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221 (1987), and *Speiser v. Randall,* 357 U.S. 513 (1958), and held the Small Venue Exemption was not content-neutral because determining whether a theatrical, musical or other performance constitutes "adult entertainment cabaret" depends on governmental review of the content of expression. (App. A-63–A-70.) Applying strict First Amendment scrutiny, it also found no compelling state interest justified the discriminatory amusement tax exemptions. (App. A-70–A-76.)

The Illinois Supreme Court issued an opinion on March 19, 2009 that reversed and remanded the Appellate Court decision and upheld the facial validity of the small venue exemption. (App. A-1–A-54.) It found that this Court's First Amendment case law on differential taxation did not apply. Instead, it held the Chicago amusement tax exemptions were permissible "subsidies" of selected local live performances under *Regan v. Taxation with Representation of Washington,* 461 U.S. 540 (1983), *Rust v. Sullivan,* 500 U.S. 173 (1991), and *National Endowment for the Arts v. Finley,* 524 U.S. 569 (1998). It also reversed the Appellate Court's holding that the Small Venue Exemption's adult entertainment cabaret exclusion was content-based. In doing so, it equated the differential tax treatment

based on medium of expression approved in *Leathers v. Medlock*, 499 U.S. 439 (1991), with the subject matter exemptions in the County's and City's ordinances. (App. A-42–A-52.)

Finding it had "settled the first amendment issue," the Court upheld dismissal of Pooh Bah's facial freedom of expression claims, and remanded for the Appellate Court to consider Pooh Bah's remaining claims. Pooh Bah subsequently dismissed those claims and the Illinois Supreme Court decision is now final.

On June 8, 2009, Petitioner filed a consent application for an extension of time within which to file a petition for certiorari to, and including, July 17, 2009. That application was granted on June 12, 2009.

## REASONS FOR GRANTING THE PETITION

It is settled law that the First Amendment does not permit the government to impose taxes that discriminate based on the content of speech. *E.g.*, *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). A separate line of authority holds that the government may impose certain conditions on the content of expression when it sponsors or subsidizes speech in some limited circumstances. *E.g.*, *Rust v. Sullivan*, 500 U.S. 173 (1991). Although these lines of authority are distinct, lower courts have noted that a lack of clear direction from this Court has led to

difficulty in applying the controlling principles. *See Board of Trustees of the Leland Stanford Jr. University v. Sullivan*, 773 F. Supp. 472, 475 (D.D.C. 1991) ("it has become increasingly difficult to discern a principled rule applicable to all ... situations").

The decision below exploits the absence of direction in a way that further blurs the lines and threatens to obliterate the body of law governing discriminatory tax exemptions. Among other things, the *Pooh Bah* court misinterpreted *Regan*, *Rust*, and *Finley* to circumvent the rule of *Arkansas Writers' Project* and other speech-tax cases, and it distorted this Court's holding in *Leathers* with respect to the core meaning of content-neutrality. This coincides with a flurry of legislative activity at the state and local level and a growing number of conflicting decisions in lower courts. Review by this Court therefore is essential to clarify and preserve the First Amendment prohibition against content-based taxation.

## I. THE ILLINOIS SUPREME COURT'S REASONING DISTORTS THIS COURT'S FIRST AMENDMENT DIFFERENTIAL TAXATION JURISPRUDENCE

### A. Discriminatory Taxes on Expression Are Unconstitutional

Just as this Court has always understood that "the power to tax involves the power to destroy," *McCulloch v. Maryland*, 17 U.S. (Wheat.) 316, 431 (1819), it has long held the power to tax also includes the power to censor. *Murdock v. Pennsylvania*, 319

U.S. 105, 112 (1943) ("[t]he power to tax the exercise of a privilege is the power to control or suppress its enjoyment"). To be sure, generally applicable taxes may be levied on the press and entertainment industry, much as they are on any other business. However, this Court has characterized "special" taxes on expression as "a form of prior restraint on speech" and has regarded such taxes as inherently suspect. This Court has explained that such "obnoxious" taxes led to adoption of the First Amendment. *Minneapolis Star*, 460 U.S. at 583-84 & n.6 (citing *Grosjean*, 297 U.S. at 248).

Differential taxes on expression requiring strict First Amendment scrutiny fall into three distinct categories: (1) taxes that single out the press; (2) taxes that target a small group of speakers; and (3) taxes that discriminate based on the content of expression. *Leathers*, 499 U.S. at 447. *See Grosjean*, 297 U.S. at 250-51. Because the Framers of the Constitution deemed special taxes on the press as particularly suspect, there is "a heavier burden of justification" than usual in this context. *Minneapolis Star*, 460 U.S. at 583-84 n.6. Selective taxes on expression are invalid even where there is no apparent "impermissible or censorial motive." *Id.* at 592 ("Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment.").

This Court has held consistently that these principles apply equally to discriminatory tax exemptions as well as to direct taxes. *E.g.*, *Speiser v. Randall*, 357 U.S. 513, 518 (1958) ("[A] discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech."). In

*Minneapolis Star*, the Court invalidated an exemption for the first $100,000 in paper and ink that treated some newspapers more favorably than others. 460 U.S. at 591-92. This principle was extended in *Arkansas Writers' Project* to invalidate a state sales tax exemption that benefited religious, professional, trade and sports magazines, among other publications. *Arkansas Writers' Project*, 481 U.S. at 229.

The Court acknowledged that the Arkansas scheme did not "single out" the press, but instead involved "a more disturbing use of selective taxation than *Minneapolis Star*, because the basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its *content*." *Arkansas Writers' Project*, 481 U.S. at 229 (emphasis in original). Using content "as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press." *Id.* at 230. This Court has reaffirmed the principle that discriminatory tax exemptions violate the First Amendment.[2]

Applying this well-established body of law, numerous state decisions have struck down various types of content-based tax distinctions as

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[2] In *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), this Court invalidated a sales tax exemption on Establishment Clause grounds because it applied only to religious publications. *See also Leathers*, 499 U.S. 439 (upholding as content-neutral a gross receipts tax applied to cable television and satellite video services, but not to revenue of newspapers and magazines).

unconstitutional. *See, e.g., Ahlburn v. Clark*, 728 A.2d 449 (R.I. 1999) (exemption for Bibles under state sales tax); *H.J. Wilson Co. v. State Tax Comm'n*, 737 So.2d 981 (Miss. 1998) (content-based tax exemption for newspapers); *City of Fresno v. Press Commc'ns, Inc.*, 36 Cal. Rptr. 2d 456 (Cal. Ct. App. 1994) (tax on "general interest magazines" but not on newspapers, or religious, professional, trade or sports journals or magazines published in the state); *City of Hallendale v. Miami Herald Publ'g Co.*, 637 So.2d 929 (Fla. Dist. Ct. App, 1994) (discriminatory tax on newspaper vending machines); *Emmis Publ'g Corp. v. Indiana Dept. of State Revenue*, 612 N.E.2d 614 (Ind. Tax. 1993) (tax exemption defining newspapers based on content subject to heightened First Amendment scrutiny); *Department of Revenue v. Magazine Publishers of Am., Inc.*, 604 So.2d 459 (Fla. 1992) (sales tax on secular magazines that exempted retail newspaper sales); *Globe Newspaper Co. v. Comm'r of Revenue*, 571 N.E.2d 617 (Mass. 1991) (sales tax scheme imposing differential tax on newspaper publishers); *Newsweek, Inc. v. Celauro*, 789 S.W.2d 247 (Tenn. 1990) (sales tax on news magazines that exempted newspapers containing general interest news and current events); *Southern Living, Inc. v. Celauro*, 789 S.W.2d 251 (Tenn. 1990) (same); *Louisiana Life, Ltd. v. McNamara*, 504 So.2d 900 (La. Ct. App. 1987) (sales tax exemption for newspapers but not magazines).

The Illinois Appellate Court below similarly applied these seemingly settled principles and found the selective exemption from the amusement tax violated the First Amendment. (App. A-62–A-76.) It found that the case turned on "the third circumstance

that triggers heightened scrutiny analysis under the first amendment – that the tax discriminates on the basis of the content of the speech." (App. A-66.) In construing the exemptions for "fine arts" venues, as well as the exclusions for adult entertainment cabarets, the court observed that one cannot determine whether the exclusions apply to a particular small venue "without considering the content of the small venue's featured speech or expressive conduct." (App. A-69.) It concluded the government had failed to advance a compelling state interest that could justify "the content-based adult entertainment cabaret exclusions contained in defendants' amusement tax schemes." (App. A-75–A-76.) The Illinois Supreme Court reversed, and adopted a starkly different analysis to uphold the tax exemptions. (App. A-42–A-52.)

### B. The Decision Below Exploits Confusion Between Cases Prohibiting Content-Based Taxes on Private Speech and Cases Permitting Government-Sponsored Speech

The Illinois Supreme Court did not dispute the lower court's reading of this Court's speech-tax jurisprudence, but based its holding on "which line of first amendment cases apply to the facts of this case." (App. A-14.) Sidestepping the differential tax cases altogether, it upheld the amusement tax exemptions under what it dubbed the "government speech/subsidy cases" of *Regan*, *Rust*, and *Finley*. It did so even though none of those cases involved tax exemptions determined by the content of expression. The ruling below tacitly adopted the reasoning of the

dissent in *Arkansas Writers' Project* while purporting to "distinguish" the opinion of the Court.[3]

Implicit in the Illinois Supreme Court's reasoning is that *if* this Court's speech-tax cases do apply, then the Chicago tax scheme unquestionably must be invalidated. The state court's decision to avoid settled authority raises the question whether cases prohibiting discriminatory tax exemptions may be bypassed altogether by local governments and lower courts simply by re-branding as "subsidies" selective tax breaks for favored speech while ignoring the selective taxation of disfavored speech.

This Court has in other contexts made clear quite recently that constitutional limitations on taxation cannot be evaded merely by "redesignation." *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. ___, 129 S.Ct. 2277, 2285 (2009). *See also id.* at 2283-84 ("Nor can Valdez escape application of the Clause by claiming that the ordinance imposes, not a duty or a tax, but a fee or a charge for 'services rendered' to a 'vessel,' such as 'pilotage,' 'wharfage,' 'medical inspection,' the 'use of locks,' or the like."). However, because this Court has never before addressed such a redesignation attempt to circumvent its speech-tax jurisprudence, the decision below threatens to spawn

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[3] (App. A-14, A-22–A-24, A-42–A-45, A-49–A-51). *Compare, Arkansas Writers' Project*, 481 U.S. at 235-38 (Scalia, J., dissenting) ("Our opinions have long recognized – in First Amendment contexts as elsewhere – the reality that tax exemptions, credits, and deductions are 'a form of subsidy that is administered through the tax system ....'").

much confusion and to undermine well-established doctrine.

### 1. This Court Has Never Equated Content-Based Tax Exemptions With Subsidies

The *Pooh Bah* court purported to locate a doctrinal key to the difference between prohibited content-based tax schemes and permissible content-based tax subsidies in *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177 (2007). (App. A-14–A-15, A-38, A-45–A-47.) However, *Davenport* had nothing to do with either discriminatory taxes *or* subsidies. The court below nevertheless lifted lengthy passages from *Davenport* simply for its quotation of *Regan*'s generic dictum that "it is well established that the government can make content-based distinctions when it subsidizes speech." (App. A-14–A-15, A-45, A-47.)

While it is surely true that, in some circumstances, content-based subsidies may present no constitutional problem, it does not follow that discriminatory, content-based tax exemptions can be reconciled with the First Amendment simply by characterizing them as "subsidies" of favored speech. The court below nevertheless reached that result by reading far too much into this Court's statement in *Regan* that tax exemptions "are *a form of subsidy* ... administered through the tax system" that have "*much the same effect* as a cash grant to the organization of the amount of tax it would have to pay on its income." (App. A-9, A-17) (quoting *Regan*, 461 U.S. at 544) (emphasis added).

The *Pooh Bah* court glossed over *Regan's* admonition that "[i]n stating that exemptions and deductions ... are like cash subsidies ... we of course do not mean to assert that they are in all respects identical."[4] In doing so, the court below committed the precise error this Court warned against, and concluded without qualification that "the tax exemptions in defendants' ordinances may be analyzed as subsidies." (App. A-38.) This erroneous equating of tax exemptions and subsidies is the linchpin of the decision below, one that starkly illustrates the "hazards of placing too much weight on a few words or phrases of the Court." *Walz*, 397 U.S. at 670.

Analytically, it is insufficient to assert that a tax exemption is "like" a subsidy or that it has "much the same effect." This Court has explained that "tax

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[4] (App. A-37.) (quoting *Regan*, 461 U.S. at 544). The *Pooh Bah* court brushed aside qualifying language from *Regan* by noting the Court there cited *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970), an Establishment Clause case, and that plaintiff had relied on *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 589-590 (1997), a Commerce Clause case. But it gave no reason why these cases should be disregarded. This Court has stressed in cases involving the Commerce Clause that where "[d]irect subsidization of domestic industry does not ordinarily run afoul of [the constitutional] prohibition; discriminatory taxation ... does." *Camps Newfound/Owatonna*, 520 U.S. at 591 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)). This principle applies with even greater force in the First Amendment context. *Minneapolis Star*, 460 U.S. at 589 n.12. Nevertheless, the court below ignored this Court's proviso in *Regan* that it would be unwise to treat discriminatory tax exemptions and subsidies as identical.

exemptions and subsidies serve similar ends, [but] they differ in important and relevant respects, and our cases have recognized these distinctions." *Camps Newfound/Owatonna*, 520 U.S. at 589. Because the Constitution bars discriminatory treatment, "there is a constitutionally significant difference between subsidies and tax exemptions," and even though "a direct subsidy ... would be permissible, our cases do not sanction a tax exemption serving similar ends." *Id.* at 589-90. In striking down a discriminatory tax exemption in *Speiser*, this Court explained that "[w]hen we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment *in the light of the particular circumstances to which it is applied*." *Speiser*, 357 U.S. at 520 (emphasis added).

In the particular circumstances presented here – a tax exemption contingent on providing government-favored expression – this Court has explained that "[t]o deny an exemption to claimants who engage in certain forms of speech is, in effect, to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech." *Id.* at 518. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited."). *Cf. Bullock*, 489 U.S. at 14 ("Every tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become 'indirect and vicarious donors'"). Given the long

history of speech-tax cases in which content-based discrimination is "presumptively unconstitutional," *Minneapolis Star*, 460 U.S. at 585, it is altogether too facile to rehabilitate preferential tax exemptions by calling them plain vanilla "subsidies." *Cf. Polar Tankers, Inc.*, 557 U.S. ___, 129 S.Ct. at 2284.

Contrary to the central premise of the decision below, this Court has never before equated content-based tax exemptions with subsidies or grants. Unlike taxes on expression, subsidies lack "the power to destroy." Such differential treatment in the tax context has always been considered "presumptively unconstitutional" because the complex burdens associated with taxation pose "too great a threat to concerns at the heart of the First Amendment." *Minneapolis Star*, 460 U.S. at 585, 589-90. As a consequence, this Court has applied an even stricter standard limiting taxes on expression than in other cases involving differential tax exemptions (such as in the Commerce Clause context) because "[w]hen delicate and cherished First Amendment rights are at stake ... the constitutional tolerance for error diminishes drastically." *Id.* at 589 n.12.

### 2. The Government Speech/Subsidy Cases Do Not Apply to Content-Based Tax Exemptions

Compounding its error, the *Pooh Bah* court's application of this Court's government speech/subsidy line of cases to uphold a content-based tax exemption hammers a doctrinal square peg into a round hole. The opinion below exacerbates confusion in an area where clarification by this Court is sorely needed,

and threatens to derail an entire line of authority. Put simply, the *Regan*, *Rust*, and *Finley* trilogy does not apply to the type of discriminatory tax exemption at issue in this case.

The Illinois Supreme Court's erroneous reliance on *Regan* elevated dictum over substance. *Regan* did not approve a content-based subsidy. Instead, this Court held that an organization that engages in substantial lobbying activities may qualify for tax exempt status under Section 501(c)(4) of the Internal Revenue Code but not under Section 501(c)(3). *Regan*, 461 U.S. at 543. Thus, in *Regan*, the issue was not *whether* the group would qualify for a tax exemption. *Id.* at 544. Moreover, the provisions at issue involved tax deductibility by contributors, not tax exemptions for the organization itself.[5]

To be analogous to the tax exemption issue in this case, the Code provisions in *Regan* would have to have granted an exemption to organizations that lobbied on behalf of the fine arts, but not for other causes. However, this Court's holding in *Regan* could never be extended to approve such content discrimination.[6] Under the line of cases culminating

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[5] *Regan*, 461 U.S. at 543. This presents a far different First Amendment question that is separate from the tax status of the organization itself. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 20-21 (1976) (limitations on contributions for a third party to engage in expression are analyzed differently under the First Amendment than restrictions on expenditures by the speaker).

[6] *See Regan*, 461 U.S. at 553 (Blackmun, J., concurring) ("Should the IRS attempt to limit the control these organizations exercise over the lobbying of their § 501(c)(4)

in *Regan*, content-neutral tax provisions designed to put "everyone in the community ... on the same footing" are permissible, *Cammarano v. United States*, 358 U.S. 498, 513 (1959), but such provisions are entirely different from tax laws that "leave room for discriminatory denial of tax-exempt status." *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1034 n.7 (D.C. Cir. 1980). As this Court explained in *Regan*, "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'aim at the suppression of dangerous ideas.'" *Regan*, 461 U.S. at 548 (citation omitted).

The Illinois court's reliance on *Rust* is even more flawed. In that case, this Court expressly distinguished *Minneapolis Star* and *Arkansas Writers' Project*, which involved discriminatory taxes, from cases like *Rust*, which involved nothing more than conditioning expenditures for a government program. *Rust*, 500 U.S. at 194-97. *Rust* did not purport to limit or modify this Court's speech-tax jurisprudence, but held only that the government can exert control over its own programs and messages.[7] As this Court later made clear in *Rosenberger v.*

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affiliates, the First Amendment problems would be insurmountable.").

[7] *Rust*, 500 U.S. at 196. The Solicitor General's brief to the Court explained that "the government restrictions are not imposed on the grantee, but rather on the specific Title X project," and "*Arkansas Writer's Project*, which involves the special problem of 'a discriminatory tax on the press' ... *obviously has little relevance here.*" Brief of the United States in *Rust v. Sullivan*, Nos. 89-1391 and 89-1392, 1990 WL 10012655, at *22 (emphasis added).

*Rector and Visitors of the University of Virginia*, 515 U.S. 819, 833-34 (1995), *Rust* was limited to situations involving "government speech," where the state is the speaker or when it enlists private entities to convey a government message.[8]

The *Pooh Bah* court's reliance on *Finley* is further removed from this Court's historic concerns about discriminatory taxation. *Finley* involved a facial challenge to a requirement that NEA grants take into consideration "general standards of decency and ... the diverse beliefs and values of the American public" in addition to "artistic excellence and artistic merit." *Finley*, 524 U.S. at 572, 576. Such a competitive award program, in which seeking a grant is entirely voluntary and most are rejected, including "many that propose 'artistically excellent' projects," *id.* at 585, is a far cry from a tax scheme, which by its nature is compulsory, and where some speakers are favored with exemptions if their expression is "commonly regarded as part of the fine arts," as the Chicago ordinances provide. (App. A-4, A-44, A-49, A-58, A-115, A-118.)

The NEA program at issue in *Finley* received less rigorous constitutional review because, as this Court explained, "the Government [was] acting as patron rather than as sovereign."[9] *Finley* is

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[8] Distinguishing both *Rust* and *Regan*, this Court explained that when the government creates a program to support private speakers, it may not impose "a speech-based restriction as its sole rationale and operative principle." *Rosenberger*, 515 U.S. at 834.

[9] *Finley*, 524 U.S. at 589. Citing *Arkansas Writers' Project* and *Leathers*, *Finley* acknowledged it would be unconstitutional

inapposite to the tax scheme here because "assessment and computation of taxes [is] a primeval governmental activity." *New Energy Co. of Ind.*, 486 U.S. at 277 (invalidating discriminatory tax exemption). *Finley* thus has no relevance to the speech-tax line of cases.

The *Pooh Bah* court's statement that Chicago was not acting "as a regulator" through its tax scheme is contradicted by the court's reliance on the assumption that adult entertainment cabarets "are known to have negative secondary effects." (App. A-16.) This stands as a stark admission that content-based taxation has a suppressive regulatory component. In any event, such considerations lend no support to the holding below. This Court has made clear that reference to zoning cases cannot support a content-based tax like the one at issue in this case. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 450-51 (2002) (Kennedy, J., concurring) ("a content-based tax may not be justified in this manner"). *See also Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992) (possibility of secondary effects cannot justify differential fee on speech). *See 729, Inc. v. Kenton County Fiscal Ct.*, 515 F.3d 485, 510 (6th Cir. 2008).

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if "the NEA were ... to award subsidies on the basis of subjective criteria [that imposed] a penalty on disfavored viewpoints." *Id.* at 587.

### C. Unless Reversed, the Decision Below Will Provide a Roadmap for Evading the Rule Against Discriminatory Taxes on Speech

By discounting the obviously applicable speech-tax cases and instead embracing the government speech/subsidy line of authority, the decision below marks a path for state and local governments to evade this Court's holdings prohibiting discriminatory content-based taxes. The Illinois Supreme Court did not actually distinguish the speech-tax cases so much as "overrule" them from below by adopting an analysis identical to the dissenting opinion in *Arkansas Writers' Project*.

Under the theory of the *Pooh Bah* opinion, Illinois would be able to implement tax exemptions for publications dedicated to subjects "commonly regarded as part of the fine arts," while expressly excluding other selected subjects, so long as the enabling legislation labeled the tax scheme as a "cultural enrichment subsidy." This Court has held that any such scheme must be subjected to strict First Amendment scrutiny. *Arkansas Writers' Project*, 481 U.S. at 232 (rejecting state's characterization of discriminatory tax as a subsidy for "fledgling publications"). But under the doctrinal sleight of hand of the decision below, First Amendment scrutiny may be avoided entirely simply by structuring content-based taxes as exemptions for preferred expression and labeling the scheme a "subsidy program." (App. A-46–A-49) ("defendants were entitled to make reasonable content-based

distinctions in creating a program to subsidize the fine arts, and ... they clearly have done so").

This question of constitutional law has become increasingly significant as states and local governments across the nation are considering, and some adopting, various content-based tax schemes. Whether motivated by the exigencies of the current financial crisis, hostility to erotic expression, or both, a growing number of legislatures are considering measures to impose special taxes on such speech.[10] For example, the Louisiana Senate recently voted unanimously to extend a state tax credit to "family friendly" film productions in the state, but to deny

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[10] *See, e.g.*, S.B. 44, 95th Leg., Reg. Sess. (Mich. 2009) (proposed excise tax on adult entertainment facilities); S.B. 91 (09 LC37 0904S), 150th Gen. Assem., 1st Sess. (Ga. 2009) (proposed surcharge on sexually oriented businesses); A. 646, 2008-2009 Leg., 2009 Sess. (N.J. 2009) (proposed fee on sexually oriented businesses); A. 7126, 2009-2010 Leg., Reg. Sess. (N.Y. 2009) (proposed surcharge on sexually oriented businesses); A. 8158, 2009-2010 Leg., Reg. Sess. (N.Y. 2009) (proposed surcharge on sexually oriented media); H.B. 809, 106th Gen. Assem., 2009 Sess. (Tenn. 2009) (proposed annual tax of 25% on sales of sexually oriented material); H.B. 2070, 81st Leg., Reg. Sess. (Tex. 2009) (proposed admission fee for certain sexually oriented businesses); H.B. 2291, 79th Leg., 1st Sess. (W. Va. 2009) (proposed tax on sale or rental of obscene materials); H.B. 2242, 80th Gen. Assem., 2d Sess. (Iowa 2004) (proposed 25% tax on "adult enterprises"); S.B. 821, 92nd Gen. Assem., Reg. Sess. (Mo. 2004) (proposed 5% tax on adult entertainment and services); H.B. 1532, 2005 Leg., Reg. Sess. (Okla. 2005) (proposed 10% tax on sexually explicit businesses); H.B. 2466, 2007-2008 Leg., 2007 Sess. (Kan. 2007) (proposed 10% tax on sexually explicit businesses); A.B. 1551, 2007-2008 Leg., Reg. Sess. (Cal. 2007) (proposed 8% tax on adult entertainment enterprises).

such tax incentives to motion pictures "deemed harmful to minors" due to sexual content. S.B. 343 (2009).

Some state and local tax schemes have resulted in litigation in the lower courts, with mixed results.[11] In a case almost identical to this one, but without reaching the constitutional issues, the New York tax court reversed an initial finding of the Department of Taxation and held that an amusement sales tax exemption for "dramatic or musical arts performances" also applies to adult entertainment cabarets. *677 New Loudon Corp., d/b/a Nite Moves*, DTA No. 821458 (N.Y. Tax App., Mar. 12, 2009) ("that the dance routines are seductive in nature and titillation of a patron is the outcome, simply does not render such dance routines as something less than choreographed performances, or remove them from the exception to the general rule of [the] Tax Law"). That decision, which is diametrically opposed to the ruling at issue here, is currently on appeal. *677 New Loudon Corp. d/b/a Nite Moves*, Notice of Exception

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[11] *See, e.g., Big Hat Books v. Blackford County Prosecutor*, 565 F. Supp. 2d 981, 994-995 (S.D. Ind. 2008) (striking down $250 assessment on sale of sexually explicit materials); *Combs v. Texas Entm't Ass'n, Inc.*, ___ S.W.3d ___, No. 03-08-00213-CV, 2009 WL 1563549 (Tex. App. June 5, 2009) (invalidating five dollar per customer charge on patrons of live nude entertainment). *See also 729, Inc.*, 515 F.3d at 510-11 (denying summary judgment to county that sought to impose discriminatory licensing fee on adult businesses). *But see Bushco v. Utah State Tax Comm'n*, Civ. No. 040911691 (Third Dist. Ct., Salt Lake County, July 3, 2007), *appeal pending*, No. 20070559-SC (Utah) (upholding ten percent gross receipts tax on sexually explicit businesses).

filed May 12, 2009. *See also Combs*, 2009 WL 1563549 (invalidating adult entertainment discriminatory tax on First Amendment grounds).

These developments suggest a pressing need for this Court to clarify the law governing discriminatory taxation of free expression. Without guidance from this Court, lower courts will continue to reach disparate results on this important question of constitutional law.

## II. THE ILLINOIS SUPREME COURT'S HOLDING ERRONEOUSLY PERMITS THE GOVERNMENT TO IMPOSE DISCRIMINATORY TAXES BASED ON ARBITRARY CONTENT-BASED JUDGMENTS

Just as the court below cannot rehabilitate an unconstitutional, discriminatory tax exemption by calling it a "subsidy," it cannot avoid First Amendment scrutiny of a content-based exemption by claiming the differential tax treatment is based on speech "format." The plain language of the ordinances under review include multi-layered content distinctions, first by exempting certain favored content ("fine arts venues") from the amusement tax, and second, by pointedly excluding disfavored content ("adult entertainment cabarets") from the exemption. (App. A-115–A-117, A-118–A-119.) Nevertheless, the Illinois Supreme Court described this as a distinction based on "activity" or "format" rather than "content." (App. A-47.) Such reasoning subverts the very concept of what it means to be "content-based."

The *Pooh Bah* court conflated a distinction based on content with one based on the medium of communication when it held the exemption at issue "is as reasonable as denying cable television subscribers an exemption reserved for purchasers of magazines and newspapers." (App. A-51.) Citing *Leathers*, the court below concluded that the plaintiff "is simply presenting an entirely different type of activity than what defendants are subsidizing," and that the Chicago tax scheme "just as reasonably excluded adult entertainment cabarets as they did movie theaters." *Id.* This is not just wrong, it is unintelligible, and greatly distorts this Court's speech-tax jurisprudence. If not corrected by this Court, the *Pooh Bah* analysis will erroneously expand *Leathers*' reasoning to swallow the rule in *Arkansas Writers' Project*, which prohibits discrimination based on subject matter.

### A. Chicago's Amusement Tax Exemptions Are Plainly Content-Based

The Chicago ordinances levy discriminatory taxes on live performances in small venues based *entirely* on the nature and substance of the performances. (App. A-4–A-7) ("The seating capacity of plaintiff's establishment is less than 750 persons. At the establishment scantily clad (but not completely nude) women give live performances of exotic dancing."). The petitioner could operate the same venues and give live performances, attract the same size audiences, and even employ the same performers, but its tax burden is determined solely by the content of the shows. Such is hardly a difference

in "medium" or "format" as the Illinois Supreme Court concluded. (App. A-47.) Where, as here, "[t]he speech in question is defined by its content," a discriminatory tax scheme "is the essence of content-based regulation." *See United States v. Playboy Entm't Group, Inc.*, 520 U.S. 803, 811-12 (2000).

The Illinois appellate court correctly found that "the adult entertainment cabaret exclusions, on their face, discriminate based on content." (App. A-69.) Noting the operative language "excludes from the amusement tax small-venue exemption those amusements that are defined, insofar as applied to plaintiff, by semi-naked erotic performance art or expression," it concluded that "[o]ne cannot determine whether the operative criteria of the adult entertainment cabaret exclusions apply to a particular small venue without considering the content of the small venue's featured speech or expressive conduct." (App. A-69.) This is precisely the constitutional infirmity with content-based taxation this Court identified in *Arkansas Writers' Project*, 481 U.S. at 230 ("to determine whether a magazine is subject to sales tax, Arkansas' 'enforcement authorities must necessarily examine the content of the message that is conveyed'") (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)).

The Illinois Supreme Court's decision reversing the appellate court is based on an utter distortion of this Court's speech-tax jurisprudence. Its effort to shoehorn the case into the "subsidy" line of authority cannot change the content-based nature of the tax exemptions. It is immaterial, for example,

if Chicago authorities were only trying to promote the expression they favor rather than suppress speech they dislike, (App. A-47), because "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment." *Minneapolis Star*, 460 U.S. at 592. Nor is it relevant whether Chicago's tax exemptions sought to promote a particular viewpoint, (App. A-48), since "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Arkansas Writers' Project*, 481 U.S. at 230 (quoting *Consolidated Edison Co. v. Public Serv. Comm'n of New York*, 447 U.S. 530, 537 (1980)).

This Court has made clear the government "cannot justify selective taxation of certain publishers" even if its purpose is simply to "foster communication" in the state. *Id.* at 232. The decision below cannot be reconciled with these basic principles. Review is necessary to forestall further confusion among lower courts.

### B. The Amusement Tax Exemptions Upheld Below Sanction Discrimination Based on Value-Laden Esthetic Judgments

The Illinois Supreme Court's decision approved not only the ability of local officials to impose differential tax rates to different content, it approved such discretion based on the arbitrary esthetic preferences of government officials. The *Pooh Bah* court concluded that the Chicago ordinances "clearly set out the type of entertainment" that would receive

a tax benefit to include "only the types of modern or traditional dance that are commonly regarded as part of the fine arts." It interpreted the exemptions as benefiting only "cultural" performances, which it defined as "relating to the artistic and intellectual aspects or content of human activity." (App. A-39–A-40, A-46–A-48, A-49 (citation omitted).) In applying this distinction between "cultural" and supposedly "low brow" performances, the court stressed that adult entertainment cabarets are subject to the full tax but that "[a]ctors who appear naked ... in fine arts productions would clearly not fall within the scope of the ... ordinance." (App. A-40.) To implement this scheme, Chicago taxing authorities needn't know much about art – they just have to know what they like ... and dislike.

The decision below undermines not just the established rule of the speech-tax cases that the government cannot discriminate based on content without a compelling justification, it also violates the bedrock requirement that authorities cannot impose their esthetic preferences on expression. As this Court has made clear, "a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system." *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 158 (1946). This is because "[w]hat is good literature, what has educational value, what is refined public information, what is good art varies with individuals, as it does from one generation to another."[12]

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[12] *Hannegan*, 327 U.S. at 157. *See Miller v. Civil City of South Bend*, 904 F.2d 1081, 1098 (7th Cir. 1990) (*en banc*)

In decision after decision, the Court has emphasized that "esthetic and moral judgments about art and literature ... are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority." *Playboy Entm't Group*, 529 U.S. at 818. The discriminatory tax scheme of the Chicago ordinances, approved by the Illinois Supreme Court, subverts these vital principles by exploiting confusion in the application of this Court's speech-tax jurisprudence. Review by this Court is essential.

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(Posner, J., concurring) ("[A]esthetic quality cannot be the standard that judges use to determine which erotic performances can be forbidden and which cannot be."), *rev'd on other grounds sub nom. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991).

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

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July 17, 2009

Supreme Court of Illinois.
POOH-BAH ENTERPRISES, INC., d/b/a Crazy Horse Too, Appellee,
v.
The COUNTY OF COOK et al., Appellants.
Nos. 105971, 105984.

March 19, 2009.

## OPINION

Justice THOMAS delivered the judgment of the court, with opinion:

At issue is whether the small venue exemptions to the amusement tax ordinances of defendants Cook County and the City of Chicago violate the first amendment to the United States Constitution (U.S. Const., amend. I) or the free speech clause of the Illinois Constitution (Ill. Const.1970, art. I, § 4). We hold that they do not.

## BACKGROUND

The City of Chicago and Cook County have substantially similar amusement tax ordinances with substantially similar small venue exemptions. The amusement tax is imposed upon the admission fee to enter, witness, view or participate in any "amusement" as defined by ordinance. Cook County Amusement Tax Ordinance § 3 (1999); Chicago Municipal Code § 4-156-020(A) (2008). Under the City's ordinance, an

amusement is:

> "(1) any exhibition, performance, presentation or show for entertainment purposes, * * * including, but not limited to, any theatrical, dramatic, musical or spectacular performance, promotional show, motion picture show, flower, poultry or animal show, animal act, circus, rodeo, athletic contest, sport, game or similar exhibition such as boxing, wrestling, skating, dancing, swimming, racing or riding on animals or vehicles, baseball, basketball, softball, football, tennis, golf, hockey, track and field games, bowling, or billiard and pool games; (2) any entertainment or recreational activity offered for public participation or on a membership or other basis including, but not limited to, carnivals, amusement park rides and games, bowling, billiards and pool games, dancing, tennis, racquetball, swimming, weightlifting, bodybuilding or similar activities; or (3) any paid television programming, whether transmitted by wire, cable, fiberoptics, laser, microwave, radio, satellite or similar means." Chicago Municipal Code § 4-156-010 (2008).

The County's definition is similar. See Cook County

Amusement Tax Ordinance § 2 (1999). Operators of amusements are responsible for collecting the taxes from patrons, keeping accurate books and records, and remitting the taxes on a monthly basis. Cook County Amusement Tax Ordinance § 5 (1999); Chicago Municipal Code § 4-156-030 (2008).

Effective January 1, 1999, the City and the County amended their respective ordinances to add small venue exemptions. These exemptions apply to "live theatrical, live musical or other live cultural performances" that take place in a space with a maximum capacity of not more than 750 people." Cook County Amusement Tax Ordinance § 3(D)(1) (1999); Chicago Municipal Code § 4-156-020 (West 2008). The following preamble accompanied the County's amendment: "WHEREAS, it is the intent of the County Board to foster the production of live performances that offer theatrical, musical or cultural enrichment to the people of Cook County." Cook County Board of Commissioner's Resolution, November 17, 1998, amending the amusement tax ordinance. The City Council Journal entry accompanying passage of the amendment to the city's ordinance includes the following statements:

> "WHEREAS, The City Council wishes to foster the production of live performances that offer theatrical, musical or cultural enrichment to the city's residents and visitors; and

> WHEREAS, Small theaters and other small venues often promote the local production of new and creative live cultural performances, and often have the most difficulty absorbing or passing on any additional costs; and
>
> WHEREAS, Costs faced by those who produce live theatrical, musical, or other culturally enriching performances at smaller venues are substantial, and such performances often require governmental support since they could not otherwise flourish[.]" City Council Journal Entry, November 12, 1998, amending § 4-156-020(D).

Defendants later amended their respective ordinances to define "live theatrical, live musical or other live cultural performance" as:

> "a live performance in any of the disciplines which are commonly regarded as part of the fine arts, such as live theater, music, opera, drama, comedy, ballet, modern or traditional dance, and book or poetry readings. This term does not include such amusements as athletic events, races or performances conducted at adult entertainment cabarets [as defined by local ordinance]." Cook County Amusement Tax Ordinance § 2 (1999);

Chicago Municipal Code § 4-156-010 (2008).

The County's zoning ordinance defines "adult entertainment cabaret" to mean:

> "A public or private establishment which features topless dancers, strippers, male or female impersonators or other entertainers who:
>
> A. Display or simulate the display of 'specified anatomical areas;' [*sic*]
>
> B. Perform in a manner which is designed primarily to appeal to the prurient interest of a patron or person; or
>
> C. Engage in, or engage in simulation of, 'specified sexual activities.'" Cook County Zoning Ordinance of 2001, art. 14.2.1 (2006).

"Specified sexual activities" are defined as:

> "A. Human genitals in a state of sexual stimulation or arousal.
>
> B. Acts of human masturbation, sexual intercourse or sodomy.
>
> C. Fondling or other erotic touching of

human genitals, pubic regions, buttocks or female breasts." Cook County Zoning Ordinance of 2001, art. 14.2.1 (2006).

"Specified anatomical areas" are defined as:

"A. Anatomical areas if less than completely and opaquely covered by a bathing suit, blouse, shirt, dress, pants, leotard or other wearing apparel or fabric.

1. Any portion of the genitals or pubic region.

2. Any portion of the buttocks.

3. Female breast(s) below a horizontal line across the breast at a point immediately above the top of the areola, including the entire lower portion of the female breast, but shall not include any portion of the cleavage of the female breast.

B. Genitals in a discernible turgid state, even if completely and opaquely covered.

C. Paint, latex or other non-fabric coverings shall not satisfy the requirement of coverage, irrespective of whether the coverage is complete or

> opaque." Cook County Zoning Ordinance of 2001, art. 14.2.1 (2006).

The City's adult use ordinance contains similar definitions of "adult entertainment cabaret," "specified sexual activities," and "specified anatomical areas." See Chicago Municipal Code § 16-16-030 (2005).

In 2001, plaintiff, Pooh-Bah Enterprises, Inc., brought suit, in the circuit court of Cook County, for declaratory and injunctive relief against the County. In its complaint, plaintiff alleged that it operates an establishment under the licensed name "Crazy Horse Too." The seating capacity of plaintiff's establishment is less than 750 persons. At the establishment, scantily clad (but not completely nude) women give live performances of exotic dancing. Plaintiff stated that it had claimed the small venue exemption because the live performances at its establishment qualify as being "live theatrical, live musical, or other live cultural performances." Plaintiff claimed that its entertainment qualified either as "modern or traditional dance" or "other live cultural performances." The County denied plaintiff the exemption on the basis that the dance performances are "performances conducted at adult entertainment cabarets." Plaintiff conceded that its dancers display "specified anatomical areas" as defined in the zoning ordinance. Plaintiff argued that the amusement tax ordinance violated the first and fourteenth amendments to the United States Constitution because it discriminated on the basis of content.

Plaintiff cited *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987), for the proposition that discrimination in taxation based on content violates the first and fourteenth amendments unless it is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. Plaintiff alleged in a separate count that the tax ordinance was overbroad in violation of the first and fourteenth amendments. Plaintiff later amended the complaint to add claims under the free speech clause of the Illinois Constitution.

The City moved to intervene on the basis that its amusement tax ordinance and small venue exemption are identical to the County's. The court granted the motion. Plaintiff then filed a second amended complaint, adding claims under the first amendment and the free speech clause against the City. In addition, plaintiff added vagueness challenges against both defendants.

Defendants moved to dismiss the second amended complaint pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2006)), alleging that it did not state any claims upon which relief could be granted. The circuit court granted the motion and dismissed the complaint in its entirety. Pertinent to the first amendment and free speech clause claims, the circuit court rejected plaintiff's argument that defendants had imposed a differential tax subject to strict scrutiny review. The circuit court found that this was not a tax that selected a narrow

group to bear its burden fully, but was a generally applicable tax covering a broad range of amusements. The court found that the tax did not restrict, regulate, or prohibit exotic dance at plaintiff's establishment.

The circuit court upheld the small venue exemption under the reasoning of *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983), *Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991), and *National Endowment for the Arts v. Finley*, 524 U.S. 569, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998). The circuit court noted that *Regan* held that tax exemptions are a "form of subsidy that is administered through the tax system," having "much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income." *Regan*, 461 U.S. at 544, 103 S.Ct. at 2000, 76 L.Ed.2d at 136. After reviewing the facts and holdings of *Regan*, *Rust*, and *Finley*, the circuit court concluded as follows:

> "What *Regan*, *Rust*, and *Finley* recognize is that state action which interferes is different from state action which encourages an alternative activity based on public policy. *Regan*, 461 U.S. at 545, 103 S.Ct. 1997, *Rust*, 500 U.S. at 193, 111 S.Ct. 1759, *Finley*, 524 U.S. at 588, 118 S.Ct. 2168. The issue is not whether the City and County are interfering with exotic dancing at Pooh-Bah's bar but whether the City and County are

> required to subsidize that exotic dancing. The Small Venue Exemptions simply made a policy decision to subsidize small venues to 'foster the production of live performances that offer theatrical, musical or cultural enrichment.' See, City Council Journal Entry of 11/12/98, amending § 4-156-020(D) and Cook County Board of Commissioner's resolution to amend CATO effective February 1, 1997. The City and County are not engaging in discrimination based on viewpoint or content; they are merely choosing to fund one activity to the exclusion of another."

The circuit court further concluded that the ordinances were neither overbroad nor vague.

Plaintiff moved to reconsider and to file a third amended complaint adding two counts alleging violations of the uniformity clause (Ill. Const.1970, art. IX, § 2) of the Illinois Constitution. The court allowed Pooh-Bah to amend its complaint, and then denied reconsideration of its earlier ruling and dismissed the uniformity clause claims.

Plaintiff appealed, and the appellate court reversed. 378 Ill.App.3d 268, 317 Ill.Dec. 384, 881 N.E.2d 552. On appeal, plaintiff argued that defendants' ordinances: (1) violate the first amendment of the United States Constitution; (2) violate the free speech

clause of the Illinois Constitution; (3) are overbroad; (4) are vague; and (5) violate the uniformity clause of the Illinois Constitution. The appellate court reached only the first issue, reversing the circuit court on the basis that the ordinances violate the first amendment because they contain content-based regulations on speech that do not serve a compelling state interest. Although acknowledging that "[t]he only question presented by a section 2-615 motion to dismiss for failure to state a cause of action is whether sufficient facts are stated in the complaint which, if true, could entitle the plaintiff to relief' (378 Ill.App.3d at 272, 317 Ill.Dec. 384, 881 N.E.2d 552), the appellate court decided the first issue on the merits.[1] The appellate court first determined that the small venue exemptions to the amusement tax ordinances were not content neutral because one can only tell if something is an "adult entertainment cabaret" by considering the content of the expression featured at the establishment. 378 Ill.App.3d at 276, 317 Ill.Dec. 384, 881 N.E.2d 552. Thus, the appellate court concluded that it was dealing with a content-based differential tax on erotic dance, and therefore strict scrutiny review applied. 378 Ill.App.3d at 276, 317 Ill.Dec. 384, 881 N.E.2d 552. In a section of its opinion entitled "Compelling Interest," the appellate court reviewed

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[1]Defendants point out that, because they moved to dismiss on the pleadings, they had not even been given a chance to assert a compelling state interest. Defendants argue that, if plaintiff's complaint is found to state a cause of action, the cause should be remanded so that they may address the strict scrutiny standard.

*Regan*, *Rust*, and *Finley* and found them inapplicable. The court held that "*Regan*, *Rust*, and *Finley* do not establish that the government can encourage one private speaker over another based on content or message without implicating first amendment concerns." 378 Ill.App.3d at 277, 317 Ill.Dec. 384, 881 N.E.2d 552. The court then held that it could find no compelling state interest that would justify the adult entertainment cabaret exclusions in the amusement tax ordinances. Accordingly, the court held that the small venue exemptions violated the first amendment. Because of its resolution of this issue, the court did not consider plaintiff's remaining arguments. 378 Ill.App.3d at 279, 317 Ill.Dec. 384, 881 N.E.2d 552.

We allowed defendants' petitions for leave to appeal. 210 Ill.2d R. 315.

## ANALYSIS

A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face. *Marshall v. Burger King Corp.*, 222 Ill.2d 422, 429, 305 Ill.Dec. 897, 856 N.E.2d 1048 (2006). A cause of action should not be dismissed pursuant to a section 2-615 motion unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief. *Canel v. Topinka*, 212 Ill.2d 311, 318, 288 Ill.Dec. 623, 818 N.E.2d 311 (2004). In ruling on such a motion, only those facts apparent from the face of the pleadings, matters of which the court can take judicial notice, and judicial admissions in the record may be

considered. *Mt. Zion State Bank & Trust v. Consolidated Communications, Inc.*, 169 Ill.2d 110, 115, 214 Ill.Dec. 156, 660 N.E.2d 863 (1995). We accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Marshall*, 222 Ill.2d at 429, 305 Ill.Dec. 897, 856 N.E.2d 1048. However, a plaintiff may not rely on mere conclusions of law or fact unsupported by specific factual allegations. *Anderson v. Vanden Dorpel*, 172 Ill.2d 399, 408, 217 Ill.Dec. 720, 667 N.E.2d 1296 (1996). We review *de novo* an order granting a section 2-615 motion to dismiss. *Wakulich v. Mraz*, 203 Ill.2d 223, 228, 271 Ill.Dec. 649, 785 N.E.2d 843 (2003).

[7] Although plaintiff labeled its challenge as both facial and as-applied, we agree with defendants that there is no discernable as-applied challenge in plaintiff's complaint. Rather, the complaint challenges the statute as unconstitutional on its face, and this was the basis of the appellate court's holding. "Facial invalidation 'is, manifestly, strong medicine' that 'has been employed by the court sparingly and only as a last resort.'" *Finley*, 524 U.S. at 580, 118 S.Ct. at 2175, 141 L.Ed.2d at 511, quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830, 841 (1973). A party raising a facial challenge under the free speech clause of the first amendment "must demonstrate a substantial risk that application of the provision will lead to the suppression of speech." *Finley*, 524 U.S. at 580, 118 S.Ct. at 2175, 141 L.Ed.2d at 511.

Defendants do not dispute that the dancers who perform at plaintiff's establishment are engaging in conduct protected by the first amendment. Erotic dancing of the sort practiced at plaintiff's establishment is protected by the first amendment, although the Supreme Court has described it as falling only within the outer ambit of the first amendment's protection. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S.Ct. 1382, 1391, 146 L.Ed.2d 265, 278 (2000); see also *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66, 111 S.Ct. 2456, 2460, 115 L.Ed.2d 504, 511 (1991) (plurality opinion) (describing such activity as "expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so"). The parties disagree vehemently over which line of first amendment cases apply to the facts of this case. The following passage from a recent first amendment case, *Davenport v. Washington Education Ass'n*, 551 U.S. 177, ----, 127 S.Ct. 2372, 2381, 168 L.Ed.2d 71, 81-82 (2007), sets forth the difference:

> "It is true enough that content-based regulations of speech are presumptively invalid. See, *e.g., R.A.V. v. St. Paul*, 505 U.S. 377, 382 [, 112 S.Ct. 2538, 120 L.Ed.2d 305] (1992) (citing cases). We have recognized, however, that '[t]he rationale of the general prohibition ... is that content discrimination "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace."' *Id.*, at

> 387 [112 S.Ct. 2538] (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116[, 112 S.Ct. 501, 116 L.Ed.2d 476] (1991)). And we have identified numerous situations in which that risk is inconsequential, so that strict scrutiny is unwarranted. * * * Of particular relevance here, our cases recognize that the risk that content-based distinctions will impermissibly interfere with the marketplace of ideas is sometimes attenuated when the government is acting in a capacity other than as regulator. Accordingly, it is well established that the government can make content-based distinctions when it subsidizes speech. See, *e.g., Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 548-550[, 103 S.Ct. 1997, 76 L.Ed.2d 129] (1983)."

Plaintiff argues, and the appellate court held, that the small venue exemptions in the defendants' amusement tax ordinances are presumptively invalid content-based discriminatory taxes. Thus, plaintiff contends that the relevant cases are those involving differential taxation based on content, and the ordinances may not be upheld unless they pass strict scrutiny review. Defendants argue, and the trial court found, that all that has happened here is that defendants have made permissible content-based distinctions when they

subsidized speech. Defendants argue that the first amendment is not a suicide pact that means that the government may not subsidize the fine arts unless it is also willing to subsidize activities that are known to have negative secondary effects. Accordingly, defendants contend that, under the line of cases allowing government to subsidize one activity to the exclusion of another, plaintiff's complaint does not state a claim upon which relief can be granted. We will now review some of the major decisions from these two lines of cases.

Government Speech/Subsidy Cases

In *Regan*, a nonprofit corporation, Taxation With Representation of Washington (TWR), was denied tax-exempt status under section 501(c)(3) of the Internal Revenue Code (26 U.S.C. § 501(c)(3)) because the Internal Revenue Service determined that a substantial part of its activities would consist of attempts to influence legislation. Under section 501(c)(3), tax-exempt status was not available to any organization if a substantial part of its activities consisted of attempting to influence legislation. TWR brought a declaratory judgment action, claiming that section 501(c)(3)'s prohibition against substantial lobbying violated the first amendment. Relying on *Speiser v. Randall,* 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958), TWR argued that section 501(c)(3) imposed an unconstitutional condition and that to " 'deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them

for [the same] speech.'" *Regan*, 461 U.S. at 545, 103 S.Ct. at 2001, 76 L.Ed.2d at 136, quoting *Speiser*, 357 U.S. at 518, 78 S.Ct. at 1338, 2 L.Ed.2d at 1468. The Supreme Court agreed with TWR that government may not deny a benefit to a person because he engages in speech, but denied that that had happened in the case before it. The Supreme Court explained that "[b]oth tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income." *Regan*, 461 U.S. at 544, 103 S.Ct. at 2000, 76 L.Ed.2d at 136. Thus, the Supreme Court concluded that Congress had not infringed any constitutional rights or regulated any first amendment activity. It had "simply chosen not to pay for TWR's lobbying." *Regan*, 461 U.S. at 546, 103 S.Ct. at 2001, 76 L.Ed.2d at 137. The Court also rejected the Court of Appeals' view that strict scrutiny applies whenever a statute affects " 'first amendment rights on a discriminatory basis.' " *Regan*, 461 U.S. at 548, 103 S.Ct. at 2002, 76 L.Ed.2d at 138. The Court explained that strict scrutiny does not apply every time Congress subsidizes some speech but not all speech, and that "Congressional selection of particular entities or persons for entitlement to this sort of largesse 'is obviously a matter of policy and discretion not open to judicial review unless in circumstances which here we are not able to find.'" *Regan*, 461 U.S. at 549, 103 S.Ct. at 2002-03, 76 L.Ed.2d at 139, quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 317, 57 S.Ct. 764, 768, 81 L.Ed. 1122, 1130 (1937).

*Rust* involved a facial challenge to Department of Health and Human Services regulations that limit the ability of Title X recipients to engage in abortion-related activities. Title X of the Public Health Service Act provides federal funding for family-planning services, but section 1008 of the Act provides that "'[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.'" *Rust*, 500 U.S. at 178, 111 S.Ct. at 1765, 114 L.Ed.2d at 246, quoting 42 U.S.C. § 300a-6. Regulations later clarified that Congress intended Title X funds to be used only to support preventative family-planning services. *Rust*, 500 U.S. at 179, 111 S.Ct. at 1765, 114 L.Ed.2d at 246. Regulations promulgated pursuant to Title X also specifically provided that Title X recipients could "'not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.'" *Rust*, 500 U.S. at 179, 111 S.Ct. at 1765, 114 L.Ed.2d at 246, quoting 42 C.F.R. § 59.8(a)(1) (1989).

A group of Title X grantees and doctors brought suit challenging the facial validity of the regulations and seeking declaratory and injunctive relief to prevent their implementation. The plaintiffs claimed, *inter alia*, that the regulations violated their first amendment rights by impermissibly discriminating based on viewpoint. They claimed that the regulations placed viewpoint-discriminatory conditions on government subsidies, thereby penalizing their free

speech rights. The plaintiffs conceded that government may place certain conditions on the receipt of federal subsidies, but could not discriminate in such a manner as to aim at the suppression of dangerous ideas. *Rust*, 500 U.S. at 192, 111 S.Ct. at 1771-72, 114 L.Ed.2d at 254-55.

The court rejected the plaintiffs' argument, concluding that "[t]here is no question but that the statutory prohibition contained in § 1008 is constitutional." *Rust*, 500 U.S. at 192, 111 S.Ct. at 1772, 114 L.Ed.2d at 255. The Court explained:

> "Here the Government is exercising the authority it possesses under *Maher* and *Harris v. McRae*, 448 U.S. 297 [100 S.Ct. 2671, 65 L.Ed.2d 784] (1980), to subsidize family planning services which will lead to conception and childbirth, and declining to 'promote or encourage abortion.' The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other. '[A] legislature's decision not to subsidize the

exercise of a fundamental right does not infringe the right.' *Regan, supra*, at 549 [103 S.Ct. 1997]. See also *Buckley v. Valeo,* 424 U.S. 1[, 96 S.Ct. 612, 46 L.Ed.2d 659]; *Cammarano v. United States, supra.* 'A refusal to fund protected activity, without more, cannot be equated with the imposition of a "penalty" on that activity.' *McRae, supra*, at 317, n. 19 [100 S.Ct. 2671]. 'There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.' *Maher, supra*, at 475 [97 S.Ct. 2376].

To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect. When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, 22 U.S.C. § 4411(b), it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism

> and fascism. Petitioners' assertions ultimately boil down to the position that if the Government chooses to subsidize one protected right, it must subsidize analogous counterpart rights. But the Court has soundly rejected that proposition. *Regan v. Taxation with Representation of Wash., supra*; *Maher v. Roe, supra*; *Harris v. McRae, supra*. Within far broader limits than petitioners are willing to concede, when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust*, 500 U.S. at 193-94, 111 S.Ct. at 1772-73, 114 L.Ed.2d at 255-56.

The dissent argued unsuccessfully that "the counseling and referral provisions at issue * * * constitute content-based regulation of speech." *Rust*, 500 U.S. at 209, 111 S.Ct. at 1781, 114 L.Ed.2d at 266 (Blackmun, J., dissenting, joined by Marshall and Stevens, JJ.).

*Finley* involved a facial challenge to section 954(d)(1) of the National Foundation on the Arts and Humanities Act of 1965 (20 U.S.C. § 954(d)(1)). This section requires the Chairperson of the National Endowment for the Arts (NEA) to ensure that "artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American

public." 20 U.S.C. § 954(d)(1). The four people who brought the suit were performance artists who were initially recommended for NEA grants by an advisory panel, but then were denied funding after section 954(d)(1) was enacted. The Supreme Court found no first amendment violation, concluding that section 954(d)(1) would not give rise to suppression of protected expression:

> "Any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding. The NEA has limited resources, and it must deny the majority of the grant applications that it receives, including many that propose 'artistically excellent' projects." *Finley*, 524 U.S. at 585, 118 S.Ct. at 2177-78, 141 L.Ed.2d at 514-15.

The Court explained that it would be a different case if "the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints." *Finley*, 524 U.S. at 587, 118 S.Ct. at 2178, 141 L.Ed.2d at 516. This is because, even in the provision of subsidies, the "Government may not 'ai[m] at the suppression of dangerous ideas.'" *Finley*, 524 U.S. at 587, 118 S.Ct. at 2178, 141 L.Ed.2d at 516, quoting *Regan*, 461 U.S. at 550, 103 S.Ct. at 2003, 76 L.Ed.2d at 139. Moreover, the Court explained that "a more pressing constitutional question would arise if Government

funding resulted in the imposition of a disproportionate burden calculated to drive 'certain ideas or viewpoints from the marketplace.'" *Finley*, 524 U.S. at 587, 118 S.Ct. at 2179, 141 L.Ed.2d at 516, quoting *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105, 116, 112 S.Ct. 501, 508, 116 L.Ed.2d 476, 487 (1991). However, the Court again reiterated that there is a difference between the government acting as regulator and the government subsidizing the arts:

> "Finally, although the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake. So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities. See *Regan, supra*, at 549 [103 S.Ct. 1997]. In the 1990 amendments that incorporated § 954(d)(1), Congress modified the declaration of purpose in the NEA's enabling Act to provide that arts funding should 'contribute to public support and confidence in the use of taxpayer funds,' and that '[p]ublic funds ... must ultimately serve public purposes the Congress defines.' § 951(5). And as we

> held in Rust, Congress may 'selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.' 500 U.S., at 193 [111 S.Ct. 1759]. In doing so, 'the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.' *Ibid.*; see also *Maher v. Roe*, 432 U.S. 464, 475[, 97 S.Ct. 2376, 53 L.Ed.2d 484] (1977) ('There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy')." *Finley*, 524 U.S. at 587-88, 118 S.Ct. at 2179, 141 L.Ed.2d at 516-17.

Justices Scalia and Thomas concurred in the judgment. These justices concluded that section 954(d)(1) unquestionably discriminated on the basis of viewpoint, but found this to be perfectly constitutional in the subsidy context. Justices Scalia and Thomas argued that "[i]t is preposterous to equate the denial of taxpayer subsidy with measures '"aimed at the suppression of dangerous ideas."' (Emphasis in original.) *Finley*, 524 U.S. at 596, 118 S.Ct. at 2183, 141 L.Ed.2d at 522 (Scalia, J., concurring, joined by Thomas, J.), quoting *Regan*, 461 U.S. at 550, 103 S.Ct.

at 2003, 76 L.Ed.2d at 139, quoting *Cammarano v. United States*, 358 U.S. 498, 513, 79 S.Ct. 524, 533, 3 L.Ed.2d 462, 472 (1959), quoting *Speiser v. Randall*, 357 U.S. 513, 519, 78 S.Ct. 1332, 1338, 2 L.Ed.2d 1460, 1468 (1958). The concurring justices would have held that there is a fundamental divide between abridging speech and funding other speech, and that the first amendment is inapplicable in the later situation. *Finley*, 524 U.S. at 599, 118 S.Ct. at 2184, 141 L.Ed.2d at 523 (Scalia, J., concurring, joined by Thomas, J.). Justice Souter dissented, arguing that the provision amounted to unconstitutional viewpoint-based discrimination. *Finley*, 524 U.S. at 600-01, 118 S.Ct. at 2185, 141 L.Ed.2d at 524-25 (Souter, J., dissenting).

In *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), a University of Virginia student organization that published a Christian newspaper brought an action against the University, challenging its denial of funds from a fund specifically created by the University to make payments to outside contractors for the printing costs of student publications. Payment was withheld for the publication in question because it "'primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.'" *Rosenberger*, 515 U.S. at 822-23, 115 S.Ct. at 2513, 132 L.Ed.2d at 711. The Supreme Court held that the University's denial of funds violated the students' rights under the free speech clause of the first amendment. The Court held that the University had created a limited public forum through

its student activities fund, and, once it had done so, it could not discriminate on the basis of viewpoint. The Court stated that content discrimination may be permissible if it preserves the purposes of the limited forum, but viewpoint discrimination is presumed impermissible when directed against speech otherwise within the forum's limitation. *Rosenberger*, 515 U.S. at 829-30, 115 S.Ct. at 2516-17, 132 L.Ed.2d at 715-16. The Court distinguished Rust on the grounds that, "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes," but that viewpoint-based restrictions were not "proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers." *Rosenberger*, 515 U.S. at 833-34, 115 S.Ct. at 2519, 132 L.Ed.2d at 718. Thus, the Court concluded that "[h]aving offered to pay the third-party contractors on behalf of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints." *Rosenberger*, 515 U.S. at 835, 115 S.Ct. at 2519, 132 L.Ed.2d at 719.

*Legal Services Corp. v. Velazquez*, 531 U.S. 533, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001), involved a first amendment challenge to a provision of the Legal Services Corporation Act (42 U.S.C. § 2996 *et seq.*). The Act established a nonprofit corporation, the Legal Services Corporation (LSC), to distribute funds to provide financial support in noncriminal proceedings to people who cannot afford legal assistance. One of

the provisions prohibited a lawyer working for an LSC grantee from challenging existing welfare law. The provision had been interpreted to mean that an attorney could not argue that a state statute conflicts with a federal statute or that either a state or local statute is unconstitutional. Lawyers employed by New York City LSC grantees brought suit to declare this portion of the Act invalid because it instituted impermissible viewpoint-based discrimination in violation of the first amendment. *Velazquez*, 531 U.S. at 536-37, 121 S.Ct. at 1046, 149 L.Ed.2d at 69.

In a 5-4 decision, the Supreme Court held that the statute violated the first amendment. The Court reiterated the principles that viewpoint-based funding decisions can be upheld when the government is the speaker or when the government uses private speakers to transmit information pertaining to its own program. The Court cautioned, however, that "[n]either the latitude for government speech nor its rationale applies to subsidies for private speech in every instance." *Velazquez*, 531 U.S. at 542, 121 S.Ct. at 1049, 149 L.Ed.2d at 72. The Court explained that *Rosenberger* was such a situation because in that case the program was designed to encourage a diversity of views, and once it had opened up such a forum, the government could not engage in viewpoint-based discrimination. The Court again reiterated that "[w]hen the government creates a limited forum for speech, certain restrictions may be necessary to define the limits and purposes of the program. [Citations.] The same is true when the government establishes a

subsidy for specified ends." *Velazquez*, 531 U.S. at 543, 121 S.Ct. at 1050, 149 L.Ed.2d at 73-74. The Court then noted that this was a subsidy case rather than a limited forum case, but that the limited forum cases provided "some instruction." *Velazquez*, 531 U.S. at 544, 121 S.Ct. at 1050, 149 L.Ed.2d at 74. The Court concluded that, because the purpose of the program was to provide legal representation for those who could not afford it, once the Congress established such a program, it could not limit the arguments that lawyers could make because to do so would distort the legal system by altering the traditional role of LSC attorneys in advising their clients and presenting arguments. *Velazquez*, 531 U.S. at 544, 121 S.Ct. at 1050, 149 L.Ed.2d at 74. The Court found problematic the "attempt to draw lines around the LSC program to exclude from litigation those arguments and theories that Congress finds unacceptable." *Velazquez*, 531 U.S. at 546, 121 S.Ct. at 1051, 149 L.Ed.2d at 75. The Court explained that:

> "Congress was not required to fund an LSC attorney to represent indigent clients; and when it did so, it was not required to fund the whole range of legal representations or relationships. The LSC and the United States, however, in effect ask us to permit Congress to define the scope of the litigation it funds to exclude certain vital theories and ideas. The attempted restriction is designed to insulate the Government's interpretation

> of the Constitution from judicial challenge. The Constitution does not permit the Government to confine litigants and their attorneys in this manner." *Velazquez*, 531 U.S. at 548, 121 S.Ct. at 1052, 149 L.Ed.2d at 76-77.

The Court distinguished *Rust* on the basis that advice from an attorney to his client and the advocacy by the attorney to the courts cannot be "classified as governmental speech even under a generous understanding of the concept." *Velazquez*, 531 U.S. at 542-43, 121 S.Ct. at 1049, 149 L.Ed.2d at 73.

Justice Scalia, joined by Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas, dissented, arguing that the majority's decision had no foundation in the Court's precedents because there had never been a "distorts an existing medium of expression" test. *Velazquez*, 531 U.S. at 555, 121 S.Ct. at 1056, 149 L.Ed.2d at 81 (Scalia, J., dissenting, joined by Rehnquist, C.J., and O'Connor and Thomas, JJ.). The dissent would have found the subsidy program perfectly constitutional because no coercion of belief was involved and there was no threat that the subsidy would "'drive certain ideas or viewpoints from the marketplace.'" *Velazquez*, 531 U.S. at 552-53, 121 S.Ct. at 1054, 149 L.Ed.2d at 79 (Scalia, J., dissenting, joined by Rehnquist, C.J., and O'Connor and Thomas, JJ.), quoting *Finley*, 524 U.S. at 587, 118 S.Ct. at 2178, 141 L.Ed.2d at 516. The dissent found that the case was indistinguishable from *Rust*, and that the

majority's attempt to distinguish *Rust* was "so unpersuasive it hardly needs response" because if "the private doctors' confidential advice to their patients * * * in *Rust* constituted 'government speech,' it is hard to imagine what subsidized speech would not be government speech." (Emphasis in original.) *Velazquez*, 531 U.S. at 554, 121 S.Ct. at 1055, 149 L.Ed.2d at 80 (Scalia, J., dissenting, joined by Rehnquist, C.J., and O'Connor and Thomas, JJ.).

Differential Tax Cases

*Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), involved a challenge to a Minnesota use tax on the cost of paper and ink used in the production of publications. Ink and paper used in producing publications were the only items subject to the use tax that were components of goods to be sold at retail. The Minnesota legislature later amended the statute to exempt the first $100,000 worth of ink and paper consumed by a publication in any calendar year. After the exemption went into effect, only 11 publishers, producing 14 of the 388 paid circulation newspapers in the state, incurred a tax liability. *Minneapolis Star & Tribune Co.*, 460 U.S. at 577-79, 103 S.Ct. at 1367-68, 75 L.Ed.2d at 299-300. The Supreme Court held that the tax statute violated the first amendment for two different reasons: (1) the tax singled out the press for special treatment (*Minneapolis Star & Tribune Co.*, 460 U.S. at 582-89, 103 S.Ct. at 1370-74, 75 L.Ed.2d at 302-07); and (2) the

$100,000 exemption meant that only a handful of publishers paid any tax, and even fewer paid a significant amount of tax (*Minneapolis Star & Tribune Co.*, 460 U.S. at 591-92, 103 S.Ct. at 1375, 75 L.Ed.2d at 308-09). Thus, a small group of newspapers had been targeted. The Court struck the statute down, because the only state interest identified was in raising revenue. The Court explained that:

> "A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency." *Minneapolis Star & Tribune Co.*, 460 U.S. at 585, 103 S.Ct. at 1371, 75 L.Ed.2d at 304.

*Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987), involved a first amendment challenge to an Arkansas sales tax exemption from a generally applicable sales tax for newspapers and "'religious, professional, trade, and sports journals and/or publications printed or published within this State.'" *Arkansas Writers' Project, Inc.*, 481 U.S. at 224, 107 S.Ct. at 1725, 95 L.Ed.2d at 216, quoting Ark. Stat. Ann. § 84-1904(j).

The publisher of a general interest magazine that covered a wide variety of topics, including religion and sports, claimed that denying it the exemption that was allowed to other magazines violated its rights under the first and fourteenth amendments. The Court struck down the statute, explaining that "selective taxation of the press-either singling out the press as a whole or targeting individual members of the press-poses a particular danger of abuse by the State." *Arkansas Writers' Project, Inc.*, 481 U.S. at 228, 107 S.Ct. at 1727, 95 L.Ed.2d at 219. The Court held that the tax at issue impermissibly targeted a small group within the press. The Court found this tax scheme particularly problematic because a magazine's tax status depended entirely on its content. *Arkansas Writers' Project, Inc.*, 481 U.S. at 229, 107 S.Ct. at 1728, 95 L.Ed.2d at 219-20. Because the Court invalidated the tax scheme on this basis, it did not reach the magazine's alternate claim that treating magazines and newspapers differently violated the first amendment. Justice Scalia and Chief Justice Rehnquist dissented, arguing that the subsidy scheme struck down here was no different from others that the Court had upheld. *Arkansas Writers' Project, Inc.*, 481 U.S. at 235-38, 107 S.Ct. at 1730-32, 95 L.Ed.2d at 223-25 (Scalia, J., dissenting, joined by Rehnquist, C.J.).

In *Leathers v. Medlock*, 499 U.S. 439, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991), a cable television subscriber and a trade organization of cable operators brought a first amendment challenge to Arkansas's sales tax on

cable television services. Arkansas imposed a gross receipts tax on the sale of tangible personal property and specified services. However, the statute in question expressly exempted receipts from subscription and over-the-counter newspaper sales and subscription magazine sales. Cable television was not exempted. *Leathers*, 499 U.S. at 441-43, 111 S.Ct. at 1440-41, 113 L.Ed.2d at 500-01.

The Court rejected the first amendment challenge, explaining that differential taxation of first amendment speakers is constitutionally suspect when it threatens to "suppress the expression of particular ideas or viewpoints." *Leathers*, 499 U.S. at 447, 111 S.Ct. at 1443, 113 L.Ed.2d at 503. The Court explained that the government may not, without a compelling justification: (1) exercise its taxing power to single out the press; (2) target a small group of speakers; or (3) discriminate on the basis of the content of taxpayer speech. *Leathers*, 499 U.S. at 447, 111 S.Ct. at 1443-44, 113 L.Ed.2d at 503-04. The Court found none of those situations present. First, the tax was a tax of general applicability that did not single out the press. Second, a narrow group had not been selected to fully bear the burden of the tax. Third, the Court found that the Act was not content based; it simply applied to all cable television services. *Leathers*, 499 U.S. at 447-48, 111 S.Ct. at 1443, 113 L.Ed.2d at 503-04. The Court explained that "differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas." *Leathers*,

499 U.S. at 453, 111 S.Ct. at 1447, 113 L.Ed.2d at 507-08. The Court found no problem with the Arkansas statute because the state legislature had

> "chosen simply to exclude or exempt certain media from a generally applicable tax. Nothing about that choice has ever suggested an interest in censoring the expressive activities of cable television. Nor does anything in this record indicate that Arkansas' broad-based, content-neutral sales tax is likely to stifle the free exchange of ideas." *Leathers*, 499 U.S. at 453, 111 S.Ct. at 1447, 113 L.Ed.2d at 508.

In *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958), a group of honorably discharged World War II veterans were denied property tax exemptions for failing to sign a loyalty oath. The California constitution provided veterans with a property tax exemption. Beginning in 1954, the form to apply for the exemption contained a loyalty oath whereby the applicant would agree not to advocate the overthrow of the United States or California governments by force, violence or other unlawful means or to advocate the support of a foreign government against the United States. The oath was added pursuant to a statute that attempted to implement a constitutional amendment that provided that no one who advocates the overthrow of the government can receive any tax exemption. The

veterans argued that the statute denied them freedom of speech without the procedural safeguards required by the due process clause of the fourteenth amendment. *Speiser*, 357 U.S. at 514-17, 78 S.Ct. at 1336-37, 2 L.Ed.2d at 1466-67.

The Court found that, although the state constitutional provision was valid, the method that the state had chosen to implement it was not, and that the veterans could not be required to execute the declaration as a condition for obtaining a tax exemption. The Court ultimately invalidated the statute on due process grounds, but, as part of its analysis, the Court explained:

> "It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech. The Supreme Court of California recognized that these provisions were limitations on speech but concluded that 'by no standard can the infringement upon freedom of speech imposed by section 19 of article XX be deemed a substantial one.' [*First Unitarian Church v. County of Los Angeles*], 48 Cal.2d 419, 440, 311 P.2d 508, 521. It is settled that speech can be effectively limited by the exercise of the taxing power. *Grosjean v. American Press Co.*, 297 U.S. 233[, 56 S.Ct. 444, 80 L.Ed. 660]. To deny an exemption to

claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty,' its denial may not infringe speech. This contention did not prevail before the California courts, which recognized that conditions imposed upon the granting of privileges or gratuities must be 'reasonable.' It has been said that Congress may not by withdrawal of mailing privileges place limitations upon the freedom of speech which if directly attempted would be unconstitutional. *See Hannegan v. Esquire, Inc.*, 327 U.S. 146, 156[, 66 S.Ct. 456, 90 L.Ed. 586]; *cf. Milwaukee Publishing Co. v. Burleson*, 255 U.S. 407, 430-431[, 41 S.Ct. 352, 65 L.Ed. 704] (Brandeis, J., dissenting). This Court has similarly rejected the contention that speech was not abridged when the sole restraint on its exercise was withdrawal of the opportunity to invoke the facilities of the National Labor Relations Board, *American Communications Assn. v. Douds*, 339 U.S. 382, 402[, 70 S.Ct. 674, 94 L.Ed. 925], or the opportunity for public employment, *Wieman v. Updegraff*, 344

> U.S. 183[, 73 S.Ct. 215, 97 L.Ed. 216]. So here, the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech. The denial is 'frankly aimed at the suppression of dangerous ideas.' *American Communications Assn. v. Douds, supra,* at 402 [70 S.Ct. 674]." *Speiser*, 357 U.S. at 518-19, 78 S.Ct. at 1338, 2 L.Ed.2d at 1468.

The Small Venue Exemptions Do Not Violate the First Amendment

Before explaining why the small venue exemptions do not violate the first amendment, we must address two preliminary matters. First, despite Regan's express statement that "[b]oth tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system" (*Regan*, 461 U.S. at 544, 103 S.Ct. at 2000, 76 L.Ed.2d at 136), plaintiff takes issue with defendants' categorization of a tax exemption as being a form of subsidy, and relies on a footnote in Regan in which the Court explained that, "[i]n stating that exemptions and deductions, on the one hand, are like cash subsidies, on the other, we of course to do not mean to assert that they are in all respects identical" (*Regan*, 461 U.S. at 544 n. 5, 103 S.Ct. at 2000 n. 5, 76 L.Ed.2d at 136 n. 5, citing *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 674-75, 90 S.Ct. 1409, 1414-15, 25 L.Ed.2d 697, 704-05 (1970)). In addition,

plaintiff cites *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 589-90, 117 S.Ct. 1590, 1605, 137 L.Ed.2d 852, 873-74 (1997), in support of its claim that exemptions and subsidies differ in important respects. However, *Camps Newfound* was a commerce clause case, and *Walz* was an establishment clause case. *Regan*, like the present case, involved a claim under the free speech clause of the first amendment. In this context, the Supreme Court quite clearly said that tax exemptions can be considered to be subsidies that are administered through the tax system. If there was any doubt about this, it was put to rest in *Davenport*, where the Court cited *Regan*-a tax-exemption case-for the proposition that it is "well established that the government can make content-based distinctions when it subsidizes speech." *Davenport*, 551 U.S. at ----, 127 S.Ct. at 2381, 168 L.Ed.2d at 81. Thus, for our purposes, the fact that the Supreme Court has drawn distinctions between exemptions and subsidies in commerce clause and establishment clause cases is irrelevant, and the tax exemptions in defendants' ordinances may be analyzed as subsidies.

Second, we must address the scope of the definition of "adult entertainment cabaret" in the ordinances. Plaintiff has misperceived the scope of this definition, and a proper understanding of it is necessary before we may resolve the constitutionality of the ordinances. Plaintiff has continually argued that under the plain language of the ordinances, theaters showing plays such as "Hair," in which the actors appear naked,

would be subject to being classified as "adult entertainment cabarets."[2] The County's zoning ordinance defines "adult entertainment cabaret" as, *inter alia*, a

> "public or private establishment which features topless dancers, strippers, male or female impersonators or other entertainers who:
>
> A. Display or simulate the display of 'specified anatomical areas[.]'" Cook County Zoning Ordinance of 2001, art. 14.2.1 (2006).

According to plaintiff, an actor who appears naked or partially naked in a play is an "other entertainer" who displays specified anatomical areas, and thus applicability of the small venue exemption can turn on whether there is any nudity or partial nudity in a production.

We disagree with plaintiff's interpretation because it violates the cardinal rule of statutory construction known as *ejusdem generis*. The rules of statutory construction apply to municipal ordinances. *Napleton v. Village of Hinsdale*, 229 Ill.2d 296, 306, 322 Ill.Dec. 548, 891 N.E.2d 839 (2008). Under the *ejusdem generis* doctrine, when a statutory clause specifically describes

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[2]Plaintiff made this argument in relation to its overbreadth counts, but it is relevant to the issue before us.

several classes of persons or things and then includes "other persons or things," the word "other" is interpreted to mean "other such like." *People v. Davis*, 199 Ill.2d 130, 138, 262 Ill.Dec. 721, 766 N.E.2d 641 (2002). *Ejusdem generis* is a "common drafting technique designed to save the legislature from spelling out in advance every contingency in which the statute could apply." 2A N. Singer & J. Singer, Sutherland on Statutory Construction § 47:17, at 370-73 (7th ed.2007). The interpretation is justified on the ground that, if the general words were given their full and ordinary meaning, the specific words would be superfluous as encompassed by the general terms. If the legislature had meant the general words to have their unrestricted sense, it would not have used the specific words. 2A N. Singer & J. Singer, Sutherland on Statutory Construction § 47:17 (7th ed.2007). Applying this drafting technique makes perfect sense here because it allows the County to clearly set out the type of entertainment it is talking about, while not giving particular establishments easy ways around the definition: *e.g.*, "they are not strippers, they already have their clothes off"; "they are not topless, but bottomless"; *etc.* Thus, the phrase does not mean "any entertainer," but "entertainers like strippers, topless dancers, or male or female impersonators." Actors who appear naked or partially naked in fine arts productions would clearly not fall within the scope of the County's ordinance.

The City's ordinance is worded slightly differently. In the City's adult use ordinance, the phrase "topless

dancers, strippers, male or female impersonators" is followed by a semicolon, and the next clause is "not infrequently features entertainers who display specified anatomical areas." For several reasons, we construe the City's definition of "adult entertainment cabaret" as having the same meaning as the County's. First, the City was granted permission to intervene in this case based on its insistence that its amusement tax ordinance and small venue exemptions were identical to the County's and that any appellate court ruling on the validity of the County's ordinance would apply to its ordinance as well. Moreover, in moving to dismiss plaintiff's overbreadth count, the City argued that the plaintiff's interpretation of its ordinance as applying to nudity in theatrical productions was "erroneous as a matter of law." Second, in *Schultz v. City of Cumberland,* 228 F.3d 831 (7th Cir. 2000), the court held that an ordinance that defined an "adult cabaret" as, *inter alia,* a "commercial establishment which *regularly features*: (a) persons who appear in a state of nudity or semi-nude" (emphasis added) could be interpreted to mean that it must feature "nudity, semi-nudity or specified sexual content as the permanent focus of its business and [give] special prominence to such content on a permanent basis," and this would preclude application of the definition to theaters showing productions such as "Hair." *Schultz,* 228 F.3d at 849-50.We believe that this same interpretation can be given to an ordinance that uses the phrase "not infrequently features." Third, all provisions of a legislative enactment are viewed as a whole, and thus all words and phrases must be

interpreted in light of other relevant provisions and must not be construed in isolation. *Brucker v. Mercola*, 227 Ill.2d 502, 514, 319 Ill.Dec. 543, 886 N.E.2d 306 (2007). When the definition of "adult entertainment cabaret" is read *in its entirety*, it is clear what type of entertainment the City is talking about. Therefore, although the wording of the City's ordinance, unlike the County's, does not present the textbook case of *ejusdem generis*, the term "entertainer" in the City's ordinance should be construed the same as the term "other entertainer" in the County's ordinance. The amusement tax ordinances therefore draw a clear distinction between two entirely different types of entertainment.

With these understandings in place, we now turn to a consideration of the constitutionality of the small venue exemptions. We believe that the exemptions clearly fall within the scope of Supreme Court authority allowing the government to make content-based distinctions when it subsidizes speech, and plaintiff cannot plead any set of facts that would demonstrate otherwise.

The first thing that must be understood is that the amusement taxes are *generally applicable* taxes applying to a broad range of amusements, with some involving protected speech and some not. "When the State imposes a generally applicable tax, there is little cause for concern." *Minneapolis Star & Tribune*, 460 U.S. at 585, 103 S.Ct. at 1371, 75 L.Ed.2d at 304. Plaintiff has cited a Texas trial court opinion and a

Tennessee Attorney General opinion finding that taxes on patrons of strip clubs were unconstitutional. *Texas Entertainment Ass'n v. Combs,* No. D-1-GN07-004179 (345th Dist. March 28, 2008); Legality of Privilege Tax on Entry of Customers Into Adult-Oriented Establishments, Tenn. Op. Att'y Gen. 08-78 (April 2, 2008). But the problem with these taxes was that they were placed *only* on adult entertainment. In the Tennessee Attorney General opinion, the Attorney General explained that first amendment concerns were raised because the tax would apply only to patrons of adult-oriented establishments, but that the first amendment would not prohibit subjecting these patrons to generally applicable taxes. Legality of Privilege Tax on Entry of Customers Into Adult-Oriented Establishments, Tenn. Op. Att'y Gen. 08-78 (April 2, 2008). Here, even when the small venue exemptions are taken into account, many amusements featuring protected first amendment activity are still taxed, including performances in venues holding more than 750 persons, movies, any paid television programming, promotional shows, and performances at adult entertainment cabarets. Thus, this situation does not present the danger warned against in *Finley* that government funding can result "in the imposition of a disproportionate burden calculated to drive 'certain ideas or viewpoints from the marketplace.'" *Finley*, 524 U.S. at 587, 118 S.Ct. at 2179, 141 L.Ed.2d at 516, quoting *Simon & Schuster, Inc.*, 502 U.S. at 116, 112 S.Ct. at 508, 116 L.Ed.2d at 487.

Here, we are *not* dealing with a direct regulation of

adult entertainment but rather a clearly identified government program to foster the production of live performances that offer theatrical, musical or cultural enrichment to the people of Cook County and Chicago. Defendants have chosen to implement this program by exempting from the amusement tax performances that take place in venues that seat 750 persons or fewer and feature live performances in any of the disciplines that are commonly regarded as part of the fine arts. The question we must resolve is whether defendants have run afoul of the first amendment in doing so, and we keep the following principles in mind.

"There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Maher v. Roe*, 432 U.S. 464, 475, 97 S.Ct. 2376, 2383, 53 L.Ed.2d 484, 495 (1977). In the subsidy context, funding may be allocated according to criteria that would not be permissible when direct regulation of speech is involved. *Finley*, 524 U.S. at 587-88, 118 S.Ct. at 2179, 141 L.Ed.2d at 516. The Supreme Court has also explained that, "[w]ithin far broader limits than petitioners are willing to concede, when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust*, 500 U.S. at 194, 111 S.Ct. at 1773, 114 L.Ed.2d at 256. Moreover, the Supreme Court has stated that when government establishes subsidies for specified ends, certain restrictions may be necessary to define the program's limits (*Velazquez*, 531 U.S. at 543, 121 S.Ct. at 1050,

149 L.Ed.2d at 73-74), and "it is well established that the government can make content-based distinctions when it subsidizes speech" (*Davenport*, 551 U.S. at ----, 127 S.Ct. at 2381, 168 L.Ed.2d at 81). The legislature's decision not to subsidize the exercise of a fundamental right does not infringe that right and is not subject to strict scrutiny, and "[w]here governmental provision of subsidies is not 'aimed at the suppression of dangerous ideas,'" *Cammarano*, 358 U.S. at 513 [79 S.Ct. 524], its 'power to encourage actions deemed to be in the public interest is * * * far broader' *Maher, supra*, at 476 [97 S.Ct. 2376]." *Regan*, 461 U.S. at 550, 103 S.Ct. at 2003, 76 L.Ed.2d at 139.

Here, all that has happened is that defendants have enacted a government program believed to be in the public interest-encouraging fine arts performances in small venues-and have defined the program in such a way that will achieve its ends. Defendants have chosen to accomplish this goal by subsidizing live fine arts performances in small venues, and they are entitled to define the parameters of that program in a way that will accomplish their goals. Because the goal is to encourage live fine arts performances in small venues, it is perfectly logical for defendants to exclude categories of protected speech that will not advance its goals, *e.g.*, movies, television, promotional shows, performances at adult entertainment cabarets, and performances in venues that seat more than 750 persons.

Moreover, the Supreme Court has drawn a clear

distinction between engaging in content-based discrimination in *establishing* a program and engaging in viewpoint-based discrimination within the program. In *Rosenberger*, the Court explained that content discrimination is permissible if it preserves the purposes of the limited forum, but viewpoint-discrimination is presumed impermissible when directed against speech otherwise within the forum's limitation. *Rosenberger*, 515 U.S. at 829-30, 115 S.Ct. at 2519, 132 L.Ed.2d at 715-16. In that case, the program that was established was to fund the printing costs of student publications. Once it had established this program, the University attempted to discriminate against those publications expressing religious viewpoints. The Court applied this same reasoning in *Velazquez*. In that case, the Court applied the limited-forum rationale to a subsidy case and explained that the government was not required to fund LSC attorneys to represent indigent clients, and, in establishing such a program, Congress could set reasonable limits on the range of legal representation and relationships. What it could not do was, once it had set up a program for representation of indigent clients in specified situations, place limits on the arguments that the lawyer was entitled to make on behalf of his client. *Velazquez*, 531 U.S. at 544, 121 S.Ct. at 1050, 149 L.Ed.2d at 74.

Applying those same principles here, defendants were entitled to make reasonable content-based distinctions in creating a program to subsidize the fine arts, and, as stated above, they clearly have done so. What would

be problematic, under the reasoning of the above cases, would be to engage in viewpoint-based discrimination within the parameters of the program. Thus, for example, it would likely raise first amendment concerns if defendants were to decide that the exemption would not be available for theaters featuring plays that express disfavored viewpoints. The appellate court's statement that the government cannot encourage one private speaker over another based on content or message (378 Ill.App.3d at 277, 317 Ill.Dec. 384, 881 N.E.2d 552) is simply not correct. While that is true when the government creates a limited public forum for diverse viewpoints (*Rosenberger*, 515 U.S. at 834-35, 115 S.Ct. at 2519, 132 L.Ed.2d at 718-19), it is not true as a general principle. Clearly, the government can make content-based distinctions in enacting a program believed to be in the public interest, and that is all that has happened here. A more appropriate label for the difference between adult entertainment cabarets and small fine arts venues might be "format" or "activity" rather than content, but even if the difference is one of "content," the Supreme Court has quite clearly stated that "it is well established that the government can make content-based distinctions when it subsidizes speech." *Davenport*, 551 U.S. at ----, 127 S.Ct. at 2381, 168 L.Ed.2d at 81. If one of those permissible distinctions is not a distinction between fine arts venues and strip clubs, it is difficult to imagine what would be.

Defendants' program does *not* discriminate on the

basis of viewpoint. Indeed, the program established here is even less problematic than the one considered in *Finley*. In *Finley*, the statute required a consideration of decency and respect standards in awarding grants. Here, defendants have chosen to subsidize all productions at small fine arts venues, and no minimum standards have to be met and no considerations of viewpoint are taken into account. The Supreme Court has stated that subsidies may indirectly abridge speech, but only if the funding scheme is "'manipulated' to have a 'coercive effect'" on those who do not hold the subsidized position or when the government's power is leveraged into "a penalty on disfavored viewpoints." *Finley*, 524 U.S. at 587, 118 S.Ct. at 2178, 141 L.Ed.2d at 516. Clearly, that has not happened here, and defendants have likewise not aimed at the suppression of dangerous ideas. See *Finley*, 524 U.S. at 587, 118 S.Ct. at 2178, 141 L.Ed.2d at 516. Venues that fall within the government's program can present any ideas they wish, and no idea or viewpoint is suppressed.

Plaintiff erroneously sees itself as within the program set up by defendants, but then discriminated against because of the content of its performances. In its complaint, plaintiff pleaded that its entertainment is encompassed by either "modern or traditional dance" or "other live cultural performances." These are simply conclusions, however, and plaintiff cannot plead specific facts placing its activities within these terms. First, the ordinances do not simply use the term "modern or traditional dance." Rather, they apply to "a

live performance in any of the disciplines *which are commonly regarded as part of the fine arts*, such as live theater, music, opera, drama, comedy, ballet, *modern or traditional dance*, and book or poetry readings." Cook County Amusement Tax Ordinance § 2 (1999); Chicago Municipal Code § 4-156-010 (2008). The terms "modern or traditional dance" must be read in light of the opening phrase "commonly regarded as part of the fine arts." Thus, the ordinances apply only to the types of modern or traditional dance that are commonly regarded as part of the fine arts. Second, the word "cultural" means "of or relating to the artistic and intellectual aspects or content of human activity." Webster's Third New International Dictionary 552 (1993).

Plaintiff simply cannot plead facts that would place the activities that take place at adult entertainment cabarets within these definitions. Rather, the types of activities that take place at "adult entertainment cabarets" have been described by the Supreme Court as falling only within the outer ambit of the first amendment's protection (*City of Erie*, 529 U.S. at 289, 120 S.Ct. at 1391, 146 L.Ed.2d at 278) or only marginally within the outer perimeters of the first amendment (*Barnes*, 501 U.S. at 565-66, 111 S.Ct. at 2460, 115 L.Ed.2d at 511). These definitions obviously have never been applied to the fine arts. Further, the negative secondary effects of adult entertainment cabarets have been well documented (see *City of Chicago v. Pooh Bah Enterprises, Inc.*, 224 Ill.2d 390, 412-13, 309 Ill.Dec. 770, 865 N.E.2d 133 (2006)), and

an entire body of case law deals with the standards to be employed when communities regulate the negative secondary effects of adult entertainment establishments (see, *e.g.*, *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702 (7th Cir.2003)). We are not aware of any cases dealing with negative secondary effects of fine arts venues. There is no possibility that plaintiff can plead sufficient facts to establish that it is being discriminated against within defendants' program solely because of the content of its performances. Plaintiff is simply presenting an entirely different type of activity than what defendants are subsidizing. Defendants just as reasonably excluded adult entertainment cabarets as they did movie theaters, and they are not suppressing the first amendment activity of either. Plaintiff simply cannot plead sufficient facts to demonstrate a substantial risk that application of the small venue exemptions will lead to the suppression of speech. See *Finley*, 524 U.S. at 580, 118 S.Ct. at 2175, 141 L.Ed.2d at 511.

What we have said so far clearly demonstrates why *Rosenberger* and *Velazquez* are distinguishable, and we will now address the other primary cases relied upon by plaintiff. *Minneapolis Star & Tribune Co.* and *Arkansas Writers' Project* both involved the press. In *Minneapolis Star & Tribune Co.*, the Court held that it violates the first amendment for a tax statute to

single out the press for special treatment or to target a small group within the press. Neither situation is present here. In *Arkansas Writers' Project*, the state taxed magazines differently based on their content. Whether or not a particular magazine paid the tax depended entirely on the magazine's content. In invalidating the statute, the Court once again reiterated the "particular danger of abuse" that is posed when individual members of the press are targeted. *Arkansas Writers' Project, Inc.*, 481 U.S. at 228, 107 S.Ct. at 1727, 95 L.Ed.2d at 219. Notably, however, the Court did not reach the argument of whether it was permissible to tax magazines and newspapers differently. Later, in *Leathers*, the Court held that it was permissible to exempt newspaper and magazine sales from a generally applicable tax but to deny the exemption to cable television subscribers. As we explained above, the amusement tax ordinances do not discriminate based on the content of performances at small fine arts venues. If that were the case, this would be more like the situation that the Court found problematic in *Arkansas Writers' Project*. For the reasons set forth above, however, adult entertainment cabarets are not presenting works that are a subset of defendants' program. They are presenting an entirely different type of entertainment. Thus, denying adult entertainment cabarets an exemption reserved for small fine arts venues is as reasonable as denying cable television subscribers an exemption reserved for purchasers of magazines and newspapers. Neither situation offends the first amendment.

Finally, this case is nothing like *Speiser*. That case involved a property-tax exemption for veterans. The government later conditioned the availability of that exemption on an applicant's swearing an oath that he would not engage in a particular type of political speech. The Court stated that denying the tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from that speech, and that the denial of the exemption was aimed at the suppression of dangerous ideas. *Speiser* is entirely distinguishable. In that case, the veterans who were denied the exemption were otherwise qualified for it. The tax exemption in question was a property tax exemption for veterans, and the veterans in question were denied it because they refused to sign an oath stating that they would not engage in a particular type of speech. Here, as set forth above, plaintiff never was within the scope of the exemption established by defendants. Plaintiff is not being denied an exemption for engaging in speech. Rather, plaintiff is denied the exemption because it is not a small fine arts venue. Similarly, movie theaters are denied the exemption not because of the expressive content of their performances, but because they are not small fine arts venues. Defendants are not aiming at the suppression of dangerous ideas, and plaintiff cannot seriously argue that denying it this exemption will have the effect of coercing it to refrain from any speech. Plaintiff's patrons are subject to the same generally applicable amusement taxes as they were before the small venue exemptions were enacted.

What we have said above settles the first amendment issue. Plaintiff's complaint also alleged that the small venue exemption violated the "freedom of speech" provision of the Illinois Constitution of 1970 (Ill. Const.1970, art. I, § 4). In *People v. DiGuida*, 152 Ill.2d 104, 121-22, 178 Ill.Dec. 80, 604 N.E.2d 336 (1992), this court recognized that the framers contemplated that this clause could, in certain circumstances, provide greater protection to free speech than does its federal counterpart. In its brief, however, plaintiff focuses on first amendment cases and provides no argument as to why we should interpret the free speech clause as providing greater protection here. In *Pooh Bah I*, this court noted that the majority view of state courts is that their state constitutions provide no greater protection than the first amendment when nude or seminude dancing is involved, and this court found the majority view persuasive. *Pooh Bah I*, 224 Ill.2d at 447, 309 Ill.Dec. 770, 865 N.E.2d 133. Consequently, we conclude that plaintiff's claim under the free speech clause of the Illinois Constitution did not state a claim upon which relief could be granted.

Because the appellate court went beyond the question presented to it-whether the complaint stated a cause of action-and decided the first amendment issue on the merits, it did not reach plaintiff's other claims. Plaintiff and defendants disagree over the status of those claims. Plaintiff claims that they are not "ripe" for this court's consideration because the appellate court did not reach them. Defendants claim that plaintiff has waived these arguments by not

presenting them in this court. Plaintiff, however, is the appellee in this court. The only issue decided by the appellate court was the first amendment one, and defendants brought that issue to this court for review. The appropriate course in this situation is to remand to the appellate court for consideration of those issues that it did not reach, and the appellate court should be cognizant of the rulings in this opinion and proceed accordingly. *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill.2d 127, 162, 237 Ill.Dec. 82, 708 N.E.2d 1122 (1999).

## CONCLUSION

Plaintiff's first amendment and free speech clause claims failed to state claims upon which relief could be granted. The circuit court correctly dismissed these claims, and the appellate court erred in reversing the circuit court. We reverse the appellate court's judgment and remand the cause to the appellate court for consideration of plaintiff's remaining claims.

*Appellate court judgment reversed; circuit court judgment affirmed in part; cause remanded.*

Chief Justice FITZGERALD and Justices FREEMAN, KILBRIDE, GARMAN, KARMEIER, and BURKE concurred in the judgment and opinion.

Appellate Court of Illinois,
First District, Fifth Division.
POOH-BAH ENTERPRISES, INC., d/b/a Crazy Horse Too, Plaintiff-Appellant,
v.
The COUNTY OF COOK; Barbara Bruno, Director of the Cook County Department of Revenue; and The City of Chicago, Defendants-Appellees.
No. 1-05-2924.

Dec. 21, 2007.

Stanley R. Kaminski, Duane Morris LLP, David A. Epstein, David A. Epstein, Ltd., Chicago, for Appellant.

Mara S. Georges, Corporation Counsel of the City of Chicago, Chicago (Benna Ruth Soloman, Deputy Corporation Counsel, Myriam Zreczny Kasper, Chief Assistant Corporation Counsel, Nadine J. Wichern, Assistant Corporation Counsel, of counsel), for Appellee City of Chicago.

Richard A. Devine, State's Attorney of Cook County, Chicago (Patrick T. Driscoll, Jr., Deputy State's Attorney, Michael C. Prinzi, Paul A. Castiglione, Assistant State's Attorneys, of counsel), for Appellees County of Cook and Barbara Bruno.

Justice FROSSARD delivered the opinion of the court:

***386 *269 Plaintiff Pooh-Bah Enterprises, Inc., appeals the orders that granted the motions to dismiss filed by defendants the County of Cook and the director of its department of revenue (the County), and the City of Chicago (the City). Plaintiff's dismissed action sought declaratory and injunctive relief against defendants, challenging the constitutionality of their amusement tax exemptions for small, fine arts venues that exclude adult entertainment cabarets. On appeal, plaintiff contends that the tax exemption scheme: (1) violates the first amendment of the United States Constitution; (2) violates the free speech clause of the Illinois Constitution; (3) is overbroad; (4) is vague; and (5) violates the uniformity clause of the Illinois Constitution. For the reasons that follow, we reverse the judgment of the circuit court.

## BACKGROUND

The City imposes on patrons of any amusement a tax of 8% on the admission price to enter, witness, view, or participate in any amusement within its boundaries. Chicago Municipal Code § 4-156-020(A) (amended December 15, 2004). The County imposes a virtually identical tax at a ***387 **555 rate of 3%. Cook County Amusement Tax Ordinance, § 3 (eff. April 1, 1999).

The City defines *amusement* as:

> "any exhibition, performance, presentation or show for entertainment

> purposes, * * * including, but not limited to, any theatrical, dramatic, musical or spectacular performance, promotional show, motion picture show, flower, poultry or animal show, animal act, circus, rodeo, athletic contest, sport, game or similar exhibition [or] * * * any paid television programming." Chicago Municipal Code § 4-156-010 (2006).

The County's definition of *amusement* is similar. Cook County Amusement Tax Ordinance, § 2 (eff. April 1, 1999).

Effective January 1999, the City and County amended their amusement tax ordinances, with the intent to foster the production of live performances that offer theatrical, musical or cultural enrichment. See City Council Journal Entry, November 12, 1998, amending § 4-156-020(D); Cook County Board of Commissioner's Resolution, *270 November 17, 1998, amending the amusement tax ordinance. Specifically, the City and County exempted from the amusement tax live theatrical, live musical or other live cultural performances that take place in a space with a maximum capacity of not more than 750 people (hereinafter, the small-venue exemption). Chicago Municipal Code § 4-156-020(D)(1) (2006); Cook County Amusement Tax Ordinance, § 3D(1) (eff. April 1, 1999). To clarify the exemption, amendments were passed in April 1999 defining *live theatrical, live musical or other live cultural performance* as:

> "a live performance in any of the disciplines which are commonly regarded as part of the fine arts, such as live theater, music, opera, drama, comedy, ballet, modern or traditional dance, and book or poetry readings. The term does not include such amusements as athletic events, races or performances conducted at adult entertainment cabarets [as defined by local ordinance]." Chicago Municipal Code § 4-156-010 (amended April 21, 1999); Cook County Amusement Tax Ordinance, § 2 (eff. April 1, 1999).

The following definitions are contained in section 16-16-030 of the City's adult use ordinance:

> "'Adult entertainment cabaret' means a public or private establishment which: (i) features topless dancers, strippers, male or female impersonators; (ii) not infrequently, features entertainers who display 'specified anatomical areas'; or (iii) features entertainers who by reason of their appearance or conduct perform in a manner which is designed primarily to appeal to the prurient interest of the patron or entertainers who engage in, or engage in the explicit simulation of, 'specified sexual activities.'

'Specified sexual activities' means and is defined as:

> 1. Human genitals in a state of sexual stimulation or arousal;
>
> 2. Acts of human masturbation, sexual intercourse or so do my;
>
> 3. Fondling or other erotic touching of human genitals, public region, buttock or female breast.

'Specified anatomical areas' means and is defined as:

> 1. Less than completely and opaquely covered: (a) human genitals, pubic region, (b) buttock and (c) female breast below a point immediately above the top of the areola; and
>
> 2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered." Chicago Municipal Code § 16-16-030 (2006).

**556 ***388 Similar definitions of these same three terms are contained in the County's zoning ordinance. Cook County Zoning Ordinance of 2001, art. 14.2.1 (2006).

In 2001, plaintiff filed this action for declaratory and injunctive relief against the County. Plaintiff operates

an adult entertainment cabaret in Chicago under the name Crazy Horse Too, which has a *271 maximum capacity of less than 750 persons. Crazy Horse Too features live performances of exotic dancing by scantily clad women, who, during their dances, become semi-clothed in that they remove much of their clothing and display certain specified anatomical areas. Plaintiff's complaint challenged the provision of the small-venue exemption that excludes performances conducted at adult entertainment cabarets. Plaintiff argued the exclusion violates the first amendment of the United States Constitution and the free speech clause of the Illinois Constitution. The City filed a motion to intervene as a party defendant because its amusement tax and small-venue exemption are similar to the County's. The circuit court granted the motion.

Plaintiff filed a second amended complaint, adding first amendment and free speech clause claims against the City. According to the complaint, after the small-venue exemptions were enacted, plaintiff stopped adding the amusement tax to the admission fee it charged and began paying the tax itself under protest. Plaintiff sought a refund of those taxes, arguing that the small-venue exemptions' exclusion of patrons of performances conducted at adult entertainment cabarets impermissibly discriminated on the basis of content, facially and as applied, against exotic dancing and other performances with adult content in violation of the first amendment and the free speech clause. Plaintiff also argued that the adult entertainment cabaret exclusions were, facially and as applied,

overbroad and vague in violation of the first amendment and free speech clause.

The City and County moved to dismiss plaintiff's claims under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2002)), for failure to state a claim upon which relief may be granted. The circuit court granted the motions to dismiss, concluding that the exclusion of adult entertainment cabarets from the small-venue exemptions did not violate the first amendment, that the free speech clause of the Illinois Constitution did not provide any greater protection in this type of case, and that the tax exemption schemes were neither overbroad nor vague. Plaintiff filed a motion to reconsider, which was denied by the circuit court.

Plaintiff also filed a third amended complaint, containing two claims under the uniformity clause of the Illinois Constitution. The City then moved to dismiss, and the County joined the motion. The circuit court dismissed the new claims because it found that real and substantial differences existed between small, fine arts venues and adult entertainment cabarets, that similar distinctions for tax purposes have been upheld, and that the differences bore a reasonable relationship to the small-venue exemption's purpose of enhancing the City's and County's reputations in the fine arts.

Plaintiff then appealed.

*272 ANALYSIS

The circuit court granted defendants' motions to dismiss because plaintiff failed to state a claim upon which relief may be granted. In ruling on such a motion, the court considers all well-pleaded facts and reasonable inferences in the light most favorable to the plaintiff. **557***389 *Jackim v. CC-Lake, Inc.*, 363 Ill.App.3d 759, 760-61, 299 Ill.Dec. 761, 842 N.E.2d 1113 (2005). The only question presented by a section 2-615 motion to dismiss for failure to state a cause of action is whether sufficient facts are stated in the complaint which, if true, could entitle the plaintiff to relief. *Illinois Graphics Co. v. Nickum*, 159 Ill.2d 469, 488, 203 Ill.Dec. 463, 639 N.E.2d 1282 (1994). Our review of a dismissal under section 2-615 is *de novo*. *Jackim*, 363 Ill.App.3d at 760, 299 Ill.Dec. 761, 842 N.E.2d 1113.

First Amendment

The first amendment to the United States Constitution, made applicable to the states through the due process clause of the Fourteenth Amendment, prohibits governmental action that abridges freedom of speech. U.S. Const., amends. I, XIV; *People v. Alexander*, 204 Ill.2d 472, 476, 274 Ill.Dec. 414, 791 N.E.2d 506 (2003). First amendment protections are not limited to the written or spoken word, but may also extend to expressive conduct. *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 2539, 105 L.Ed.2d 342, 353 (1989). While erotic dancing of the sort practiced at Crazy Horse Too enjoys constitutional protection as

expressive conduct, it falls "only within the outer ambit of the First Amendment's protection." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S.Ct. 1382, 1391, 146 L.Ed.2d 265, 278 (2000).

Plaintiff raises both facial and as-applied constitutional challenges to the provisions in defendants' tax schemes that exclude adult entertainment cabarets from the amusement tax small-venue exemption. Plaintiff argues that the provisions are content-based on their face and the exclusion of performances conducted at adult entertainment cabarets applies to plaintiff's small venue by reference to the expressive activity performed inside. A party raising a facial challenge to a law bears the heavy burden of demonstrating that it is unconstitutional under any set of circumstances, whereas a party raising an as-applied challenge need only show that, although the law may be constitutionally applied in most circumstances, it was specifically applied to him in an unconstitutional manner. *People v. Garvin,* 219 Ill.2d 104, 117, 301 Ill.Dec. 423, 847 N.E.2d 82 (2006).

"It is settled that speech can be effectively limited by the exercise of the taxing power." *Speiser v. Randall*, 357 U.S. 513, 518, 78 S.Ct. 1332, 1338, 2 L.Ed.2d 1460, 1468 (1958), citing *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936). *273 Although it is constitutional to tax first amendment activities in a genuinely nondiscriminatory fashion (*Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S.

221, 229, 107 S.Ct. 1722, 1727, 95 L.Ed.2d 209, 219 (1987)), the Supreme Court in *Leathers v. Medlock*, 499 U.S. 439, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991), identified three situations where a tax imposed by government will trigger strict scrutiny under the first amendment. Absent a compelling justification, the government may not exercise its taxing power to (1) single out the press, (2) target a small group of speakers, or (3) discriminate on the basis of the content of taxpayer speech. *Leathers*, 499 U.S. at 447, 111 S.Ct. at 1443-44, 113 L.Ed.2d at 503-04. Strict scrutiny requires the government to show that the law is both necessary to serve a compelling interest and narrowly tailored to achieve that end. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 1886, 146 L.Ed.2d 865, 879 (2000).

In explaining the problematic nature of differential taxation, the Supreme Court, in the context of a discriminatory tax on a certain segment of print media, stated that the general applicability of any burdensome tax helps to ensure that it will ***390 **558 be met with widespread opposition. But when such a law applies only to a single constituency, it is insulated from political constraint. *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 585, 103 S.Ct. 1365, 1371-72, 75 L.Ed.2d 295, 304-05 (1983). Speaker-based or content-based taxes, absent a compelling government interest, will be struck down as a form of censorship. *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 116, 63 S.Ct. 870, 876, 87 L.Ed. 1292, 1300 (1943) ("a

community may not suppress, or the state tax, the dissemination of views because they are unpopular, annoying or distasteful"); *Grosjean*, 297 U.S. at 244, 56 S.Ct. at 447, 80 L.Ed. at 666 (a gross receipts tax derived from advertisements carried in newspapers operated as a restraint on speech).

The Supreme Court has also recognized that content-based tax *exemptions* operate to suppress speech and implicate strict scrutiny. In *Speiser*, 357 U.S. at 518, 78 S.Ct. at 1338, 2 L.Ed.2d at 1468, where the Court deemed unconstitutional a California tax provision requiring veterans to sign a loyalty oath in order to claim a property tax exemption, the Court noted, "[i]t cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech." Similarly, Illinois courts have recognized the suppressive nature of selective taxes and selective tax exemptions, holding that they are limited by the first amendment. *American Multi-Cinema, Inc. v. City of Warrenville*, 321 Ill.App.3d 349, 354, 255 Ill.Dec. 42, 748 N.E.2d 746 (2001) (noting that a selective amusement tax on free speech will trigger heightened *274 scrutiny under the first amendment if it discriminates on the basis of content); *Satellink of Chicago, Inc. v. City of Chicago,* 168 Ill.App.3d 689, 696, 119 Ill.Dec. 545, 523 N.E.2d 13 (1988) (amusement tax amendment that targeted subscription television by exempting cable television would not withstand strict scrutiny analysis).

The City's and County's amusement taxes are taxes of general applicability, which apply to sports, theaters, movies, paid television, circuses, and numerous other forms of entertainment unless specifically exempted. The taxes do not single out the press for special treatment or target a small group of speakers. However, the third circumstance that triggers heightened scrutiny analysis under the first amendment-that the tax discriminates on the basis of the content of the speech-is an issue in this case.

Defendants argue that their amusement tax schemes should be deemed content-neutral because they were not enacted with the purpose of discriminating against any particular expression. According to defendants, the adult entertainment cabaret exclusions were not enacted to suppress protected expression but, rather, because that type of venue does not further the legitimate governmental policy of encouraging, through subsidization, small-venue fine arts performances that will enhance the City's and County's reputations in the fine arts. Because those policy interests are not related to the content of the message being expressed, defendants contend, their tax schemes should be considered content-neutral and, thus, strict scrutiny should not apply. We disagree.

Content-Neutral and Content-Based Regulations

A regulation is content-neutral so long as it is "'justified without reference to the content of the regulated speech.'" *Ward v. Rock Against Racism*, 491

U.S. 781, 791, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661, 675 (1989), quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221, 227 (1984). Generally, laws ***391 **559 that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based. *People v. Jones*, 188 Ill.2d 352, 358-60, 242 Ill.Dec. 267, 721 N.E.2d 546 (1999) (statute that banned the emission of loud amplified sound from vehicles but exempted advertising was content-based and violated the first amendment). Laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral. *Turner Broadcasting System, Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 643-44, 114 S.Ct. 2445, 2459-60, 129 L.Ed.2d 497, 518-19 (1994) (strict scrutiny did not apply to requirement that cable systems must carry full power local*275 broadcast stations because the provisions depended only on the operator's channel capacity, not the content of programming).

The first amendment does not generally countenance governmental control over the content of messages expressed by private individuals because each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. *Turner Broadcasting System, Inc.*, 512 U.S. at 641, 114 S.Ct. at 2458, 129 L.Ed.2d at 517. Thus, content-based regulations are presumptively invalid (*R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377,

382, 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305, 317 (1992)) and will be upheld only if necessary to serve a compelling governmental interest and narrowly drawn to achieve that end (*Widmar v. Vincent*, 454 U.S. 263, 270, 102 S.Ct. 269, 274, 70 L.Ed.2d 440, 447-48 (1981)).

Although the government's purpose is the controlling consideration in determining content neutrality, the mere assertion of a content-neutral purpose will not save a law "which, on its face, discriminates based on content." *Turner Broadcasting System, Inc.*, 512 U.S. at 642-43, 114 S.Ct. at 2459, 129 L.Ed.2d at 518. See also *Jones*, 188 Ill.2d at 361-62, 242 Ill.Dec. 267, 721 N.E.2d 546. The fact that defendants' small-venue exemptions may have been intended to serve content-neutral goals is not dispositive. The Supreme Court has repeatedly stated that "'[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment.'" *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 117, 112 S.Ct. 501, 509, 116 L.Ed.2d 476, 488 (1991), quoting *Minneapolis Star & Tribune Co.*, 460 U.S. at 592, 103 S.Ct. at 1376, 75 L.Ed.2d at 309. We therefore reject defendants' contention that the existence of a content-neutral purpose renders the tax ordinances at issue here content-neutral.

The language of the definitions from the City's adult use ordinance and the County's zoning ordinance, which were incorporated into the City's and County's respective small-venue exemptions, establishes that

the adult entertainment cabaret exclusions, on their face, discriminate based on content. Specifically, the definitions in the amusement tax ordinances of *live theatrical, live musical or other live cultural performance* (Chicago Municipal Code § 4-156-010 (2006); Cook County Amusement Tax Ordinance, § 2 (eff. April 1, 1999)) reference the definition of *adult entertainment cabaret* contained within the City's adult use ordinance or the County's zoning ordinance (Chicago Municipal Code § 16-16-030 (2005); Cook County Zoning Ordinance of 2001, Art. 14.2.1 (2006)). Both the City's adult use ordinance and the County's zoning ordinance define an adult entertainment cabaret by the content of the expression featured at the establishment, *e.g.*, topless dancing, stripping, entertainers who display specified***392 **560 anatomical*276 areas (excessive breast or buttocks skin exposure), etc. Chicago Municipal Code § 16-16-030 (2005); Cook County Zoning Ordinance of 2001, art. 14.2.1 (2006). Consequently, read together, the operative language of those ordinances excludes from the amusement tax small-venue exemption those amusements that are defined, insofar as applied to plaintiff, by semi-naked erotic performance art or expression. One cannot determine whether the operative criteria of the adult entertainment cabaret exclusions apply to a particular small venue without considering the content of the small venue's featured speech or expressive conduct.

Defendants are not aided by their citation to *Leathers*, where the Supreme Court found that an Arkansas

statute extending the generally applicable sales tax to cable services (but not satellite services), while maintaining existing exemptions for magazines and newspapers, did not raise first amendment concerns. *Leathers*, 499 U.S. at 453, 111 S.Ct. at 1447, 113 L.Ed.2d at 508. There, the Court determined that the Arkansas sales tax was not content-based because nothing in the statute referred to the content of mass media communications. Moreover, cable television offered subscribers a mixture of news, information, and entertainment and there was no record evidence that such material differed systematically in its message from that communicated by satellite broadcast programming, newspapers, or magazines. *Leathers*, 499 U.S. at 449, 111 S.Ct. at 1445, 113 L.Ed.2d at 505. Here, in contrast, defendants' adult entertainment cabaret exclusions are content-based and the content of the performances featured at such cabarets differs systematically in its erotic message from that communicated by the exempt fine arts venues.

Compelling Interest

Accordingly, because the differential tax on erotic dance is a content-based regulation on protected expression, it is presumptively invalid and may be upheld only if it is necessary to serve a compelling state interest and narrowly drawn to achieve that end. Because defendants argued on appeal, unsuccessfully, that their tax schemes were content-neutral, they did not argue that their tax schemes served a compelling

state interest in order to survive a first amendment strict scrutiny analysis.

Alternatively, defendants argue that their adult entertainment cabaret exclusions do not prohibit or restrict exotic dancing but, rather, are governmental policy to encourage, through subsidization, the production of innovative fine arts performances at small venues in an effort to enhance the City's and County's reputations in the fine arts. Defendants contend that new and innovative shows have a greater *277 chance of being chosen for production on Broadway or to tour nationally. Moreover, such shows may have the added effect of drawing new restaurants, shops and hotels to the surrounding community. Defendants argue that the most efficient way to subsidize small, fine arts venues is to give their patrons an exemption from the amusement tax, because it relieves small venues of the administrative and financial burdens that flow from having to collect the tax from patrons and remit it to the City and County at specified times.

Defendants argue that state action that interferes is different from state action that encourages an alternative activity based on public policy. Citing *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983), *Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991), and *National Endowment for the Arts v. Finley*, 524 U.S. 569, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998), defendants ***393

**561 argue that their tax schemes are consistent with Supreme Court rulings that allow the government to selectively fund a program to encourage certain activities it believes to be in the public interest without at the same time funding an alternative program. We disagree. *Regan, Rust*, and *Finley* do not establish that the government can encourage one private speaker over another based on content or message without implicating first amendment concerns.

*Regan* held that an internal revenue statute that prohibited tax exempt charitable organizations from using tax-deductible contributions to support their lobbying efforts did not violate the first amendment, which did not require Congress to subsidize lobbying. *Regan*, 461 U.S. at 546, 103 S.Ct. at 2001, 76 L.Ed.2d at 137. Furthermore, the statute did not violate the equal protection component of the fifth amendment, because it was rational for Congress to decide that, even though it would not subsidize substantial lobbying by charities generally, it would subsidize lobbying by veterans' organizations given our country's long-standing policy of compensating veterans for their past contributions by providing them with numerous advantages. *Regan*, 461 U.S. at 550-51, 103 S.Ct. at 2003-04, 76 L.Ed.2d at 140.

Unlike the tax ordinances before us, Congress in *Regan* did not discriminate invidiously in granting its exemptions, which were not aimed at suppressing any ideas. Veterans' organizations were entitled to receive tax-deductible contributions regardless of the content

of any speech they might use, including lobbying. Congress could exempt veterans' organizations from taxation differently than it did charitable organizations as long as the exemption was not content-based. *Regan*, 461 U.S. at 548, 103 S.Ct. at 2002, 76 L.Ed.2d at 138. *Regan* did not uphold, or even address, discrimination between speech or expressive activities based on content.

*278 In *Rust*, 500 U.S. at 178-80, 111 S.Ct. at 1764-66, 114 L.Ed.2d at 246-47, regulations prohibited recipients of federal funds appropriated for family-planning services from engaging in counseling concerning, referrals for, and activities advocating abortion and required the recipients to maintain separate facilities, personnel and accounting records from any abortion activity. Those regulations did not violate first amendment free speech rights because the government did not discriminate on the basis of viewpoint. The government merely chose to fund one activity to the exclusion of another, and the regulations simply ensured that federal funds were not used for activities, including speech, that were outside the scope of the federal program. *Rust*, 500 U.S. at 193, 111 S.Ct. at 1772, 114 L.Ed.2d at 255. In contrast to our case, *Rust* concerned the dissemination to the public of a specific government message through a focused government subsidy program that paid organizations to distribute the government's message. *Rust* did not involve encouraging selected private speech by private citizens exercising their first

amendment rights. *Rust*, 500 U.S. at 199, 111 S.Ct. at 1775, 114 L.Ed.2d at 259.

Defendants' reliance on *Rust* is misplaced because that case involved the government speech doctrine rather than government regulation of private speech. In accordance with the government speech doctrine, when the government itself is speaking or is paying a third party to speak to the public on the government's behalf, the government's message is not subject to first amendment restrictions. This doctrine follows from the simple fact that the first amendment aims to protect citizens' free speech from government interference. Later, in ***394**562 *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), the Court reiterated the point that the constitutional regulation of speech discussed in *Rust* did not apply to a government-created program to encourage private speech, but was limited to situations where the government disbursed public finds to private speakers to transmit specific information pertaining to the government's own program. *Rosenberger*, 515 U.S. at 833, 115 S.Ct. at 2519, 132 L.Ed.2d at 718 (where student organizations were subsidized by a state university but were not agents of the university, the student organizations' subsidized speech was private speech rather than government speech and, thus, not exempt from first amendment protection).

In *Finley*, 524 U.S. at 581-83, 118 S.Ct. at 2175-76, 141 L.Ed.2d at 512-13, the Court upheld a grant program

provision that implemented the consideration of decency and respect standards when determining which art projects would receive government subsidies. The provision was facially constitutional because it did not place conditions on grants *279 or preclude awards to projects that might be deemed indecent or disrespectful. *Finley*, 524 U.S. at 581-83, 118 S.Ct. at 2175-77, 141 L.Ed.2d at 512-13. Any content-based considerations taken into account in the grant-making process were a consequence of the nature of arts funding where the government agency's mandate was to make aesthetic judgments. *Finley*, 524 U.S. at 585-86, 118 S.Ct. at 2177-78, 141 L.Ed.2d at 514-15. The Court, however, reiterated that if the provision was applied so as to discriminate based on "'certain ideas or viewpoints'" (*i.e.*, in a content-based manner) or if the decency or respect standards were an enforced requirement, the provision would then be subject to strict scrutiny review. *Finley*, 524 U.S. at 587, 118 S.Ct. at 2178-79, 141 L.Ed.2d at 516, quoting *Simon & Schuster, Inc.*, 502 U.S. at 116, 112 S.Ct. at 508, 116 L.Ed.2d at 487. As discussed above, defendants' adult entertainment cabaret exclusions discriminate against protected speech based on content.

*Regan,*, *Rust*, and *Finley* do not support defendants' contention that affirmative government policies encouraging selective private speech do not implicate the first amendment and thereby escape strict scrutiny analysis. Moreover, we find no compelling state interest which necessitates the content-based adult entertainment cabaret exclusions contained in

defendants' amusement tax schemes. Defendants argue that they have a legitimate interest in enhancing Chicago's and Cook County's reputations in the fine arts. We do not disagree with this proposition; however, their interests do not rise to the level of a compelling state interest that will justify, under the first amendment, a content-based restriction on protected expression. See *Minneapolis Star & Tribune Co.,* 460 U.S. at 586, 103 S.Ct. at 1372, 75 L.Ed.2d at 305 (raising revenue is not a compelling interest sufficient to withstand strict scrutiny).

## CONCLUSION

Accordingly, we hold that the City's and County's adult entertainment cabaret exclusions from the amusement tax small-venue exemptions are content-based regulations on speech that do not serve a compelling state interest and, therefore, violate the first amendment. Given this holding, we do not reach plaintiff's claims that the tax schemes are unconstitutionally overbroad or vague or violate the uniformity clause of the Illinois Constitution. We reverse the orders of the trial court that granted defendants' motions to dismiss***395 **563 for failure to state a claim and remand this cause for further proceedings.

Reversed and remanded.

FITZGERALD SMITH, P.J., and TULLY, J., concur.

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION
TAX AND MISCELLANEOUS
REMEDIES SECTION

POOH-BAH ENTERPRISES, INC.,
d/b/a CRAZY HORSE TOO,
an Illinois corporation,

Plaintiff,

v.

No. 01 CH 14741
(Transferred to
Law Division)

COUNTY OF COOK, BARBARA BRUNO,
not individually, but as Director of the
COOK COUNTY DEPARTMENT OF
REVENUE, and the CITY OF CHICAGO,

Defendants.

MEMORANDUM DECISION AND JUDGMENT

This matter is before the Court on a motion filed by Plaintiff, Pooh-Bah Enterprises, Inc. ("Pooh-Bah"), to reconsider the Court's decision which granted the motion to dismiss of Defendants, Cook County ("the County"), Barbara Bruno, as Director of the Cook County Department of Revenue (the "Director") and the City of Chicago (the "City"). Pooh-Bah's dismissed action disputed the Director's decision that Pooh-Bah

did not qualify for exemptions pursuant to the Cook County Amusement Tax (the "County Tax") (§2, §3D(1)) and the Chicago Amusement Tax (the "City Tax") (§4-156-010, § 4-156-020D(l)(collectively the "Amusement Taxes").

## STATEMENT OF FACTS

Pooh-Bah is an Illinois Corporation that operates an adult entertainment cabaret under the licensed name "Crazy Horse Too" ("Crazy Horse") located within both the City of Chicago ("City") and Cook County ("County"). Crazy Horse has a capacity of less than 750 persons and provides live performances of exotic dancing by scantily clad women to patrons who are required to pay an admission fee at the door.

The City and County have nearly identical Amusement Tax ordinances which impose a tax "upon patrons of any amusement" within the boundaries of their municipality granting patrons the "privilege to enter, to witness, to view or to participate in such amusement." Municipal Code of Chicago ("MCC") §4-156 and County Amusement Tax Ordinance Chapter 13 ("CATO") (collectively the "Ordinances").

Effective January 1, 1999, the Ordinances were amended to exempt "live theatrical, live musical or other live cultural performances" that take place in a space in their municipality whose maximum capacity is not more than 750 persons with the intent of "foster[ing] the production of live performances that

offer theatrical, musical or cultural enrichment." *See,* City Council Journal Entry of November 12, 1998, amending §4-1 56-020(D) and Cook County Board of Commissioner's resolution to amend CATO effective February 1, 1997. The Ordinances were again amended, effective April 1, 1999, to add a definition of "live theatrical, live musical or other live cultural performances" in order to clarify that "amusements eligible for exemption" are to be "live cultural performances." MCC §4-156-020 and CATO, as amended effective April 1, 1999. In addition, the amended Ordinances' definitions of "live theatrical, live musical or other live cultural performances" specifically exclude certain performances, including those at "adult entertainment cabarets" (defined in the respective zoning ordinances MCC § 16-16 and Cook County Zoning Ordinance 14.2.1.).

Since 1999, Pooh-Bah has kept records and paid under protest the Amusement Taxes to the City and the County, claiming an exemption from the Amusement Taxes based on the January 1999 amendments, which exempted live musical, theatrical or other cultural performances. Instead of collecting the Amusement Taxes from its patrons, Pooh-Bah paid the County Tax and City Tax from its own funds for this period and timely filed refund claims with the City and County Departments of Revenue for a return of such Taxes paid.

Pooh-Bah filed a complaint asking the Court to hold the County Tax unconstitutional to the extent that its Small Venue Exemption:

(a) selectively imposes a tax on expressive conduct based on its content, a violation of the First and Fourteenth Amendments of the U.S. Constitution and Article I, §4, of the Illinois Constitution; and

(b) its provisions are unconstitutionally vague and overbroad, a violation of the same provisions of the United States and Illinois Constitutions.

Based on the alleged unconstitutionality of the Small Venue Exemption's selective content-based exemption and the resulting exclusion of applicability of the Small Venue Exemption to Pooh-Bah, Pooh-Bah asked the Court to permanently enjoin enforcement of the County Tax against Pooh-Bah.

Defendants moved to dismiss Pooh-Bah's constitutional attacks. Although Pooh-Bah brought the case solely against the County, on February 27, 2002 over Pooh-Bah's objection, the Court permitted the City to intervene as a Defendant. Following the City's intervention, Pooh-Bah filed a second amended Complaint formally attacking the City Tax in addition to the County Tax. In their tandem motions, Defendants contended Pooh-Bah's arguments failed as a matter of constitutional law and deserved dismissal. Pooh-Bah moved for summary judgment on the merits.

The Court granted Defendants' motion to dismiss and denied Pooh-Bah's motion for summary judgment. Pooh-Bah filed this motion for reconsideration.

## ISSUES PRESENTED

1. Whether the motion for reconsideration may properly be heard by the Court.

2. Whether the Court properly granted Pooh-Bah leave to amend its complaint.

3. Whether the amusement tax exemption schemes as interpreted by the Court violate the Illinois Uniformity Clause.

## ARGUMENTS OF THE PARTIES AND COMMENTS AND DECISION BY THE COURT

In respect to issue one, Defendants contend that the motion for reconsideration is not properly before the Court. Pooh-Bah counters as follows: Judicial error in applying the law is a sufficient basis for a motion for reconsideration. "An intended purpose of a motion to reconsider is to bring to the court's attention errors in the court's previous application of existing law." *In re Marriage of Sanda*, 245 Ill. App. 3d 314, 320 (2nd Dist. 1993); *United States Fed. & Guar. Co. v. Alliance Syndicate*, 286 Ill. App. 3d 417, 419 (1st Dist. 1997). Pooh-Bah maintains the Court's Ruling failed to follow Supreme Court and Illinois precedent and, therefore, the Court should grant this motion for reconsideration.

The Court agrees with Pooh-Bah in part. One purpose of a motion to reconsider is to inform the Court of errors in applying the law. Pooh-Bah argues such an error in its motion and, therefore, the motion for reconsideration is proper. However, the motion for reconsideration in this case is substantively limited to the issue regarding the Illinois Uniformity Clause. Article IX, Section 2, 1970 Illinois Constitution. The Court's Ruling implicated that Clause without addressing its effect on the case, which, according to Pooh-Bah, demonstrates an error in the Court's application of law. The Court will not, however, reconsider the other issues fully argued by the parties and decided by the Court. As Defendants noted, the parties adequately addressed all other issues in the briefs pertaining to the motion to dismiss. In this motion for reconsideration, Pooh-Bah merely rehashes the same arguments it made in the motion to dismiss. Rehashing those arguments does not convince the Court that is misapplied the law in regard to those issues. Therefore, the Court solely addresses the Uniformity Clause issue.

In respect to issue two, Defendants contend the Court should not have allowed Pooh-Bah leave to amend its complaint to include the Uniformity Clause issue. On May 1, 2003, the Court granted Pooh-Bah leave to add a uniformity count in an amended complaint, which Pooh-Bah filed on May 21, 2003. Pooh-Bah sought leave to amend because this Court's Ruling granted Defendants motion to dismiss by interpreting the Chicago and Cook County Amusement

Tax Ordinances in a manner that allegedly made the Ordinances inconsistent with the Uniformity Clause.

Defendants argue the Court improperly granted leave to amend on the theory that, other than to conform the pleadings to the proofs, there is no right to amend a complaint once judgment is entered. *Folkers v. Drott Manufacturing Co.*, 152 Ill. App. 3d 58, 67-68 (1st Dist. 1987). Defendants argue leave to amend should not have been granted because the Court already entered a judgment, and Pooh-Bah did not request leave to conform the pleadings to the decision and judgment. Therefore, Defendants conclude the complaint could not be amended after judgment in order for Pooh-Bah to assert a uniformity claim on the motion to reconsider.

The Court disagrees with Defendants. Defendants misstate the law. A plaintiff is generally entitled to amend after a Section 2-615 dismissal: "After ruling on motions, the court may enter appropriate orders either to permit or require pleading over or amending...." 735 ILCS 5/2-615 (d).

> Illinois courts have held that rulings on motions to dismiss generally do not dispose of actions, but allow plaintiffs an opportunity to amend their complaints unless it becomes apparent that there is no set of facts that could be pleaded that would entitle a plaintiff to recover.

*Neptuno Treuhand-Und Verwaltungsgesellschaft MBH v. Arbor*, 295 Ill. App. 3d 567, 575-76 (1st Dist. 1998). Moreover, as explained in *Sutherland v. Illinois Bell*, 254 Ill. App. 3d 983, 987 (1st Dist. 1993):

> It is well settled that the dismissal of a complaint is generally not final and appealable unless the order states that it is 'with prejudice' or in some other way indicates that the litigation is terminated and the plaintiff will not be permitted to replead.

The motion to dismiss was not granted with prejudice. Therefore, this Court did not abuse its discretion by granting Pooh-Bah an opportunity to amend its complaint to address the uniformity issue. *People ex rel. Hartigan v. E & E Hauling, Inc.*, 153 Ill. 2d 473, 505 (1992). Accordingly, the Court now takes the opportunity to address the Uniformity Clause issue allegedly implicated by the Court's Ruling granting Defendants' motion to dismiss.

In respect to issue three, Pooh-Bah contends that the amusement tax exemption schemes as interpreted by the Court violate the Illinois Uniformity Clause. Pooh-Bah argues as follows: If the Court's Ruling correctly interpreted the tax exemption schemes at issue, then those tax exemption schemes violate the Uniformity Clause.

Pooh-Bah argues that Defendants cannot explain how, without violating the Uniformity Clause, a patron who views semi-clothed dance performances at one small for-profit theater can be taxed, while the same patron who views the same semi-clothed dance performance at another small for-profit theater can be exempt from the tax. Pooh-Bah argues there is no real and substantial difference between the two theaters, the two patrons or the two performances, thus the only criterion for the tax exemption discrimination is the subjective and arbitrary classification of one theatre as an "adult entertainment cabaret," while the other theater is not so classified. Pooh-Bah relies on the factually distinguishable cases of *Commerce Nat'l Bank of City of Chicago*, 89 Ill. 2d 45 (1982); *PrimeCo Personal Communications, L.P. v. Ill. Commerce Comm'n*, 196 Ill. 2d 70 (2001); and *Searle Pharmaceuticals, Inc. v. Dept. of Revenue*, 117 Ill. 2d 454 (1987) for the rule that tax exemption classifications must be reasonable, meaning the classification "must be (1) based on a real and substantial difference between those who are taxed and those who are not taxed, and it must (2) bear some reasonable relationship to the object of the legislation or to public policy." *PrimeCo*, 196 Ill. 2d at 84.

The County zoning code specifically provides that any "establishment" that features nude or semi-clothed performances is (by definition) an adult entertainment cabaret; hence the County Amusement Tax applies to all such performances. County Zoning Ord., Art. 14 Section 14.21; County Amusement Tax,

Sect. 2. Similarly, Chicago's Zoning code classifies any "establishment" as an adult entertainment cabaret if it features (without regard to frequency) topless exotic dancers. Chicago Zoning Ord. Sec. 16-16-030. In addition, for certain other performers, Chicago adds a minimal frequency requirement, which provides that the entertainment must be provided more than "infrequently" before a theatre is deemed an adult entertainment cabaret. *Id.*

Pooh-Bah reasons venues which periodically, routinely or episodically feature semi-clothed performances of dancers, shows, plays, or musicals – such as the Bailiwick Theater, the Circle Theatre and the Playground Theatre – do so more than infrequently, and thus come under the definition of "adult entertainment cabaret," but are not subject to the tax while Pooh-Bah is subject to the tax. Pooh-Bah concludes any establishment that features exotic dancers or other semi-clothed performers is an adult entertainment cabaret and is supposed to be taxed by the City and County, whereas, under this Court's interpretation, the Chicago and County Ordinances somehow classify one such theatre as taxable, but not the other, which plainly violates the Uniformity Clause as arbitrary and unreasonable selective exemptions.

Defendants cite *Kerasotes Rialto Theater Corp. v. City of Peoria*, 77 Ill. 2d 491 (1979), *DeWoskin v. Lowe's Chicago Cinema*, 306 Ill. App. 3d 504 (1st Dist. 1999), *Jacobs v. City of Chicago*, 53 Ill. 2d 421 (1973), and *Klein v. Hulman*, 34 Ill. 2d 343 (1966) to support

the proposition that real and substantial differences between entities provide a basis for different taxation. In those cases, the court found real and substantial differences in the entity being exempted and that such differences were reasonably related to the purpose of the law. However, Pooh-Bah concludes that there is no substantial difference (content-neutral or content-based) between the theaters taxed and those not taxed. Both can be small for-profit theaters; both can be in the same locations and owned by the same parties; both can routinely feature similar if not identical semi-clothed performances; and both can fall under the explicit ordinance definition of "adult entertainment cabaret." Pooh-Bah concludes such allegedly arbitrary tax exemption schemes violate the Uniformity Clause.

The Court disagrees with Pooh-Bah. To prevail on a uniformity challenge, a plaintiff has the burden of showing that a tax ordinance is arbitrary and unreasonable. *Arangold v. Zehnder*, 204 Ill. 2d 142, 153 (2003); *Allegro Services Ltd. v. Metropolitan Pier & Exhibition Authority*, 172 Ill. 2d 243, 250-51 (1996). If a set of reasonably conceivable facts would sustain the tax ordinance, then it must be upheld. *Id.* Upon a good-faith uniformity challenge, a taxing body "need only assert a justification for the classification." *Arangold*, 204 Ill. 2d at 156. A plaintiff has the burden of persuading a court that a defendant's explanation is insufficient as matter of law, or unsupported by law. *Id.* at 157. In a uniformity challenge, a tax ordinance must be upheld unless the plaintiff clearly establishes its unconstitutionality. *Id.* at 146.

Pooh-Bah cites *Searle*, 117 Ill. 2d at 468, for the proposition that there must be "a real and substantial difference between the people taxed and those not taxed," and *PrimeCo*, 196 Ill. 2d at 84, for the proposition that a classification must "bear some reasonable relationship to the object of the legislation or to public policy." In fact, the tax exemption schemes meet these requirements in this case. There is a real and substantial difference between ordinary venues with occasional nudity and adult entertainment cabarets with routine nudity, and that difference bears a reasonable relationship to the small venue exemptions' purpose, which is to foster the production of live performances, thereby offering cultural enrichment to County and City residents and visitors.

A real and substantial difference may be based on the type of entity providing a service. *See, e.g., Kerasotes*, 77 Ill. at 495-97 (upholding exemptions based on the "nature of the entity to which the net proceeds of the amusement inures"); *Dewoskin*, 306 Ill. App. 3d 504 (stating that classifications are not objectionable if they "bear some reasonable relationship to the object of the legislation or to public policy"); *Jacobs*, 53 Ill. 2d 421 (upholding parking tax exemptions based on the nature of the parking facility); and *Klein*, 34 Ill. 2d 343 (upholding exemptions for printers who print primarily for the purpose of conveying news while imposing tax on other types of printers).

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The real and substantial difference in this case is based on the nature of the entity presenting the amusement. The purpose of small venue exemptions for "live theatrical, live musical or other live performance[s]" is to "foster the production of live performances that offer theatrical, musical or cultural enrichment to the city's residents and visitors" and to "promote the local production of new and creative live cultural performances." Performances at "adult entertainment cabarets" are excluded by the Ordinances' definitions of "live theatrical, live musical or other live performance." An "adult entertainment cabaret" is by definition a place where the performances are designed to appeal to the prurient interest of patrons. An ordinance that classified "adult movie theaters" has been upheld as properly distinguishing "adult" movie theaters differently than other movie theaters, using substantially the same definitions. *See, Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

There is no doubt that the real and substantial difference between adult entertainment cabarets and ordinary venues relates to a legitimate governmental policy. The appellate court has held that the advancement of cultural interests is a reasonable justification for an exemption. *DeWoskin*, 306 Ill. App. 3d at 522. Just as in Pooh-Bah's First Amendment claims already dismissed by this Court, adult entertainment does not yield the cultural benefits intended by the Defendants when enacting the Ordinances' small venue exemptions. The exemptions

are aimed at legitimate goals, and the City and the County should be able to tailor tax ordinances to further such goals. Therefore, the Amusement Tax exemption schemes, as interpreted by the Court's prior Ruling, do not violate the Illinois Uniformity Clause because the exemptions: (1) are based on a real and substantial difference between Pooh-Bah's performances and the performances which are not taxed; and (2) bear some reasonable relationship to the public policy of cultural development.

For the reasons stated above, the Court grants Pooh-Bah's motion for reconsideration as to the Uniformity Clause issue. Because the Court did not misapply the law, the Court's original Ruling granting Defendants' motion to dismiss stands and includes dismissal of Pooh-Bah's Uniformity Clause claim.

Enter: /s/_____
Judge Alexander P. White

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JUDGE ALEXANDER P. WHITE 1241
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DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK_____

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION
TAX AND MISCELLANEOUS
REMEDIES SECTION

POOH-BAH ENTERPRISES, INC.,
d/b/a CRAZY HORSE TOO,
an Illinois corporation,

Plaintiff,

v.

No. 01 CH 14741
(Transferred to
Law Division)

COUNTY OF COOK, BARBARA BRUNO,
not individually, but as Director of the
COOK COUNTY DEPARTMENT OF
REVENUE, and the CITY OF CHICAGO,

Defendants.

## MEMORANDUM DECISION AND JUDGMENT

This matter is before the Court on motions to dismiss by the Defendant, Director of the Cook County Department of Revenue (the "County") and the Defendant, City of Chicago (the "City") of a complaint filed by Plaintiff, Pooh-Bah Enterprises Inc. ("Pooh-Bah"), against the County and the City which determined Pooh-Bah did not qualify for an exemption pursuant to the Cook County Amusement Tax (the "County Tax") (§2, §3C) and the Chicago Amusement Tax (the "City Tax") (§ 4-156-010, § 4-156-020D(1) (collectively the "Amusement Taxes").

## STATEMENT OF FACTS

Pooh-Bah is an Illinois Corporation that operates an adult entertainment cabaret under the licensed name "Crazy Horse Too" ("Crazy Horse") located within both the City of Chicago ("City") and Cook County ("County"). Crazy Horse has a capacity of less than 750 persons and provides live performances of exotic dancing by scantily clad women to patrons who are required to pay an admission fee at the door.

The City and County have nearly identical Amusement Tax ordinances which impose a tax "upon patrons of any amusement" within the boundaries of their municipality granting patrons the "privilege to enter, to witness, to view or to participate in such amusement." Municipal Code of Chicago ("MCC") § 4-156 and County Amusement Tax

Ordinance Chapter 13 ("CATO") (Collectively the "Ordinances").

Effective January 1, the Ordinances were amended to exempt "live theatrical, live musical or other live cultural performances" that take place in a space in their municipality whose maximum capacity is not more than 750 persons with the intent of "foster[ing] the production of live performances that offer theatrical, musical or cultural enrichment." See, City Council Journal Entry of 11/12/98, amending § 4-156-020(D) and Cook County Board of Commissioner's resolution to amend CATO effective February 1, 1997. The Ordinances were again amended, effective April 1, 1999, to add the definition of "live theatrical, live musical or other live cultural performances" in order to clarify that "amusements eligible for exemption" are to be "live cultural performances." MCC § 4-156-020 and CATO, as amended effective April 1, 1999. In addition, the amended Ordinances specifically exclude certain performances including "adult entertainment cabarets" as defined in their respective zoning ordinances. MCC § 16-16 and Cook County Zoning Ordinance 14.2.1.

Since 1999, Pooh-Bah has kept records and paid the Amusement Taxes under protest to the City and the County and has claimed an exemption from the Amusement Taxes, based on the Amusement Tax amendments, effective in January of 1999, which exempted live musical, theatrical or other cultural performances from the Amusement Taxes. Instead of

collecting the Amusement Taxes from its patrons, Pooh-Bah paid the County Tax and City Tax from its own funds for this period and has timely filed refund claims with the City and County Departments of Revenue for a return of such Taxes paid.

Pooh-Bah filed a complaint seeking the Court to hold the County Tax unconstitutional to the extent that its Small Venue Exemption:

(a) selectively imposes a tax on expressive conduct based on its content, in violation of the First and Fourteenth Amendments of the U.S. Constitution and Article I, § 4, of the Illinois Constitution, and

(b) its provisions are unconstitutionally vague and overbroad in violation of the same provisions of the United States and Illinois constitutions.

Based on the unconstitutionality of the Small Venue Exemption's selective content-based exemption, and the resulting exclusion of applicability of the Small Venue Exemption to Pooh Bah, the Court was asked to permanently enjoin enforcement of the County Tax against Pooh Bah.

Defendants moved to dismiss Pooh-Bah's constitutional attacks. The case was brought solely against the County Tax but over Pooh-Bah's objection, on February 27, 2002, the City was permitted to intervene as a Defendant. Following the City's

intervention, Pooh-Bah filed a second amended Complaint formally attacking the City Tax in addition to the County Tax. In their tandem motions, Defendants argue that Pooh-Bah's arguments fail as a matter of constitutional law. Pooh-Bah moves for summary judgment on the merits.

## ISSUES PRESENTED

1. Whether Pooh-Bah has standing to challenge the County Tax.

2. Whether the Amusement Taxes, through their Small Venue Exemption, violate the First and Fourteenth Amendment to the U.S. Constitution on their face or as applied to Pooh-Bah.

3. Whether the Amusement Taxes, through their Small Venue Exemption, violate the First and Fourteenth Amendment of the U.S. Constitution as being vague and/or overbroad.

4. Whether the Amusement Taxes, through their Small Venue Exemption, violate Article I, § 4, of the Illinois Constitution of 1970 on their face and as applied to Pooh-Bah.

5. Whether the Amusement Taxes, through their Small Venue Exemption, violate Article I, § 4, of the Illinois Constitution of 1970 as being vague and/or overbroad.

## ARGUMENTS OF THE PARTIES AND COMMENTS AND DECISION BY THE COURT

"[I]t is proper for a court, when ruling on a motion to dismiss under either section 2-615 or section 2-619, to accept all well-pleaded facts in the complaint as true and to draw all reasonable references from those facts in favor of the nonmoving party." *Hanna v. City of Chicago,* 2002 Ill. App. Lexis 369, page 13 (1st Dist. 2002); *Haddick v. Valor Insurance*, 198 Ill. 2d 409, 414 (2001). "[W]here facts contained in the affidavit in support of ... summary judgment are not contradicted by counter affidavit, such facts are admitted and must be taken as true." *Heidelberger v. Jewel Companies, Inc.*, 57 Ill. 2d 87, 92-93 (1974).

In respect to issue one, Pooh-Bah contends that it has standing to challenge the County Tax. Pooh-Bah argues as follows: under the Ordinances, live dance performances at Pooh-Bah's establishment are subject to Amusement Taxes. MCC 4-156 and CATO, as amended effective April 1, 1999. As result, Pooh-Bah is required to register, account for, keep records on, collect and remit County Tax on "all admission fees or other charges for these performances. *Id.* The failure to timely collect or pay Amusement Taxes makes Pooh-Bah liable for the Tax, as well as for penalties, fines and interest. Thus Pooh-bah has a specific "cognizable interest" in the County Tax, which directly affects it. Pooh-Bah is clearly "aggrieved" by its operation. *See DeWoskin v. Lowe's Chicago Cinema, Inc.*, 306 Ill. App. 3d 504, 513 (1st Dist. 1999), citing

*Greer v. Ill. Housing Dev. Authority*, 122 Ill. 2d 462, 492-493 (1988).

The County relies on the theory that since the formal legal incidence of the Tax is on the patron, the provider does not have standing to challenge the Tax. Pooh-Bah argues that legal incidence is not the test for standing. The test is whether there is a recognizable interest or claim "capable of being affected" by the relief requested. *DeWoskin*, 306 Ill. App. 3d at 513; *Commonwealth Edison Co. v. Community Unit School Dist. 200,* 44 Ill. App. 3d 665, 670 (2nd Dist. 1976).

The Court agrees with Pooh-Bah. While the ordinances may not require it to pay the Amusement Taxes from its own funds, they have the obligation to "secure ... and to remit the tax." MCC § 4-156-030 and § 5 CATO. Sellers or providers who are required to collect or account for a tax, those persons who directly pay the tax and even those persons who are injured by the tax in other ways have been found to have standing to challenge a tax. *Marcus Corp. v. Village of South Holland*, 120 Ill. App. 3d 300, 304 (5th Dist. 1983) (holding that a hotel operator had standing to challenge hotel tax, even though legal incidence of tax was on patron); *Getto v. City of Chicago*, 77 Ill. 2d 346 (1979) (holding that telephone customers had standing to challenge the telephone tax, even though legal incidence of tax was on the utility); *Chicago Park Dist. v. City of Chicago*, 127 Ill. App. 3d 215, 218-19 (1st Dist. 1984), *affirmed* 111 Ill. 2d 7 (1986) (holding the Park District that neither collected nor paid the tax

still had standing to challenge the city tax since it impacted on its moorings).

In respect to the second issue, Pooh-Bah contends that the Amusement Taxes, through their Small Venue Exemption, violate the First and Fourteenth Amendment to the U.S. Constitution on their face or as applied to Pooh-Bah. Pooh-Bah argues as follows: Taxation of expressive conduct based on its content is prohibited by the First Amendment of the U.S. Constitution, unless it "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writer's*, 481 U.S. at 231; *American Multi-Cinema, Inc. v. City of Warrenville*, 321 Ill. App. 3d 349,354 (2nd Dist., 2001); *see also People v. Jones*, 188 Ill. 2d 352, 362 (1999).

"[T]he power to tax includes the power to destroy." *McCulloch v. Maryland,* 17 U.S. 316, 431 (1819). Thus "the power to tax differentially, as opposed to the power to tax generally, gives a government a powerful weapon against the taxpayer selected" (*American Multi-Cinema, Inc.*, 321 Ill. App. 3d at 355, citing *Minneapolis Star*, 460 U.S. at 585) - *i.e.*, the power to destroy *selectively*. A tax that discriminates on content is the functional equivalent of censorship; it suppresses expression protected by the First Amendment. *Minneapolis Star*, 460 U.S. at 583-585. Pooh-Bah argues that content-based tax exemptions from general taxes are equally prohibited. *See Arkansas Writers*, 481 U.S. at 231; *American Multi-Cinema, Inc.*, 321 Ill. App. 3d at 354.

In *Arkansas Writers*, the Supreme Court applied a strict scrutiny test to find a sales tax on magazines, which exempted only "religious, professional, trade and sports journals," unconstitutional. 481 U.S. at 224-27. The court observed that under the Arkansas tax exemption scheme "a magazine's tax status depends entirely on its content." *Id.* As *Arkansas Writers* instructs, the First and Fourteenth Amendments protect against differential taxation based on the expressive content. Both the federal and Illinois courts have found that protected expressive conduct encompasses adult-oriented expressive performance and entertainment, including exotic nude dancing, exotic semi-clothed dancing, adult television programming, and other types of adult entertainment. *City of Erie v. Pap's A.M. TDBA "Kandyland"*, 529 U.S. 277, 301 (2000) (stating that nude dancing is a form of expression that has First Amendment Protection); *See also Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981); *Jamaica Inn, Inc. v. Daley*, 53 Ill. App. 3d 257, 265 (1st Dist. 1977), *rev'd on other grounds*, 72 Ill. 2d 415 (1978); *Saints and Sinners v. City of Providence*, 172 F. Supp. 2d 348 (Dist. R.I., 2001).

Where courts found that a tax or revenue-raising fee to be differential, singling out adult entertainment over other types of entertainment due to content, they have applied the First Amendment "strict scrutiny" test. *See, e.g., Acorn Investments, Inc. v. City of Seattle*, 887 F.2d 219, 221 (9th Cir. 1989); *AAK, Inc. v. City of Woonsocket*, 830 F.

Supp. 99, 101 (Dist. Ct. R.I. 1993); *American Multi-Cinema, Inc.*, 321 Ill. App. 3d 349, 354-56 (2nd Dist. 2001).

Pooh-Bah argues that the Small Venue Exemption is, in effect, differential taxation and subjects the tax to strict scrutiny review. Exotic dance performances are expressive conduct protected by the First Amendment. The Small Venue Exemption imposes Amusement Taxes on selected expressive conduct, thus, like *Arkansas Writers*, the Taxes are a type of content-based tax legislation and presumptively unconstitutional, unless there is a compelling interest that justifies the discrimination. 481 U.S. at 231.

Pooh-Bah further argues the history of the Taxes is also pertinent. The Amusement Taxes once had a content-neutral "professional theater company" exemption (repealed in 1999). The former exemption applied to any performance in an auditorium or theater, irrespective of whether the content was sexual or exotic or was performed nude or semi-clothed. But that exemption was ultimately replaced with the content-based Small Venue Exemption that is at issue in this case. The content-based discrimination at issue here is intentional.

Pooh-Bah argues the Amusement Taxes' content-based discrimination cannot survive strict scrutiny First Amendment analysis. There is no necessity (pled, asserted or proved) that serves a

compelling state interest that could validate such a discriminatory content-based exemption. Failing the strict scrutiny test, the Small Venue Exemption, to the extent that it taxes expressive dance performances at Pooh-Bah' s establishment while exempting other live dance performances, violates the First and Fourteenth Amendment to the United States Constitution.

The Court disagrees with Pooh-Bah. A First Amendment challenge is appropriate where a statute or ordinance restricts or prohibits protected speech. However, nude or exotic dance performances "of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection (citations omitted)." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289. The general rule is that the governmental unit may not restrict or prohibit protected speech based on its content or viewpoint, unless it is necessary to serve a compelling state interest. *See*, for example, *Consol. Edison Co. of N.Y. v. Public Service Comm'n of N.Y.*, 477 U.S. 530 (1980).

The Amusement Tax Ordinances do not restrict or prohibit the exotic dance performances at Pooh-Bah, nor do they seek to regulate the amusement. Instead, they are tax ordinances of general applicability that apply to a "broad range" of amusements, "unless within specific exemptions." *Leathers v. Medlock*, 499 U.S. 439, 447 (1991). In addition to performances at adult entertainment cabarets, the tax applies to sports, car racing, movies, carnivals, paid television

and numerous other forms of entertainment. *See* MCC § 4-156-010 and CATO. Unlike a tax that "has ... selected a narrow group to bear fully the burden of the tax," a tax of general applicability imposes no real risk of "affecting only a limited range of views" and distorting the market for ideas." *Medlock*, 499 U.S. at 447-48. *See also, Arkansas Writers'*, 499 U.S. at 221.

As part of their tax scheme, the City and County have provided certain exemptions. Decisions regarding the persons and activities that are subject to a tax are policy decisions by the legislature. *See Regan*, 461 U.S. at 547. Since the legislature enjoys a familiarity with local conditions which the courts cannot have, its decisions to grant exemptions to some persons but not others are entitled to substantial deference. *Id.*

Tax exemptions are a "form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income." *Id.* at 544. When the government disburses public funds to private entities to advance a particular policy or message, a First Amendment challenge is analyzed under a line of cases involving speech by the government itself. In such cases, the government is not acting as a regulator; it is acting as a speaker, promoting its own public-interest policies.

For example, in *Regan*, where the Supreme Court held that a tax exemption granted to certain organizations that do not engage in substantial

lobbying activities did not violate the First Amendment since Congress did not infringe on any First Amendment rights or regulate any First Amendment activity, but simply chose not to subsidize substantial lobbying activities. *Id.* at 546. In *Rust*, the Supreme Court held that a restriction on the speech of doctors and other workers in federally financed family planning clinics did not violate the First Amendment reasoning the "Government has no obligation to subsidize even the exercise of fundamental rights, including 'speech rights.'" *Rust v. Sullivan*, 500 U.S. 173, 183 (1991). Finally, in *Nat'l Endowment for the Arts v. Finley*, the Supreme Court found a statute constitutional that required consideration of general standards of "decency and respect" in making decisions for funding artistic projects on a competitive basis." 524 U.S. 569 (1998). The court determined that the government was not acting in a regulatory capacity, but only in the role of a patron of the arts. *Id.* at 589. The court reasoned that the "government did not discriminate on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other." *Id.* at 588-589.

What *Regan*, *Rust*, and *Finley* recognize is that state action which interferes is different from state action which encourages an alternative activity based on public policy. *Regan*, 461 U.S. at 545; *Rust*, 500 U.S. at 193; *Finley*, 524 U.S. at 588. The issue is not whether the City and County are interfering with exotic dancing at Pooh-Bah's but whether the City and County are required to subsidize that exotic dancing.

The Small Venue Exemptions simply made a policy decision to subsidize small venues to "foster the production of live performances that offer theatrical, musical or cultural enrichment." See, City Council Journal Entry of 11/12/98, amending § 4-156-020 (D) and Cook County Board of Commissioner's resolution to amend CATO effective February 1, 1997. The City and County are not engaging in discrimination based on viewpoint or content; they are merely choosing to fund one activity to the exclusion of the other.

With respect to issue three, Pooh-Bah contends the Amusement Taxes, through their Small Venue Exemption, violate the First and Fourteenth amendment of the U.S. Constitution as being vague and/or overbroad. Pooh-Bah argues: By including within its scope numerous types of live musical, theatrical and cultural performances, based purely upon the "content" of the performance, the Amusement Taxes are overbroad, in violation of the First and Fourteenth Amendment of the United States Constitution. *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 933 (1975). Moreover, by making the taxability of a live performance turn on the imprecise description of how *much* of the human body is covered or uncovered, and the variability of some performances being inside and some outside the exemption, the Taxes are unconstitutionally vague.

Pooh-Bah further contends that under the Amusement Taxes, any type of semi-clothed live dance performance - e.g., exotic dancing, cabaret dancing,

ethnic dances, Broadway dance routines, showgirl performances, fan dancing, various follies and burlesque dance performances - are selectively subject to the Taxes due to their content. (See Article 14.21, County Zoning Code; §16-16-030, City Zoning Code, incorporated into the Amusement Tax.) Other live performance - e.g., operas, musicals, plays - are also subject to these Taxes whenever the content of the performance involves any semi-clothed performers. *Id.*

The content-based exclusion from the Small Venue Exemption is so broadly worded that many performances at so-called "ordinary" theaters are also subject to the tax based on the degree of clothing worn by the performers. Thus musicals, such as "Hair," plays like "Six Degrees of Separation" and "Girl Meets Girl," operas like "Salome," musical follies like "Folies Bergere," "Cabaret" and "Naked Boys Singing," and ballets like "Ballet Africains," are all subject to the Amusement Taxes because portions of performers' buttocks or female breasts may be visible during some performances.

Because live entertainment falls within the First Amendment protections, and because the Amusement Taxes impose a tax on all types of live performance whenever there are performers who are not sufficiently clothed to the government standards of the Defendants, the Amusement Taxes' Small Venue Exemption is overbroad - reaching far beyond any proffered justification and beyond any rational (much less compelling) reason to tax all kinds of common

entertainment, and thus violates the First and Fourteenth Amendments. *Schad v. Borough of Mt. Ephraim*, 452 U.S. at 65-66.

In *Ashcroft v. Free Speech Coalition*, 122 S.Ct. 1389 (2002), the Supreme Court struck down the Child Pornography Prevention Act of 1996 as being overbroad, in violation of the First Amendment. *Id.* at 1389. The Court noted that the Child Pornography Prevention Act applied to sexually explicit images that are advertised, promoted, presented, described or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaged in sexually explicit conduct. *Id.* at 1397. The Court emphasized that under the Act the materials need not appeal to a prurient interest; instead "any depiction of sexually explicit activity, no matter how it is presented, is proscribed." *Id.* Therefore, according to the Court, it would apply also to pictures in a "psychology manual, as well as movies depicting the horrors of sexual abuse." *Id.* It also "prohibits speech despite its serious literary, artistic, political or scientific value." *Id.* Because the wording of the Child Pornography Prevention Act could be broadly interpreted to penalize an array of lawful expressive conduct, the Supreme Court held that this Act was unconstitutionally overbroad, in violation of the First Amendment. *Id.* at 1406. (*See Doran v. Salem Inns, Inc.*, 422 U.S. at 932 and *Jamaica Inn, Inc. v. Daley*, 53 Ill. App. 3d at 264, *rev'd on other grounds*, 72 Ill. 2d 415 (1978) (finding that ordinances that prohibited nude or semi-nude

entertainment in "any public place" were overbroad and unconstitutional). (*See also, Deja Vu of Nashville, Inc. v. The Metropolitan Government of Nashville and Davidson County, Tennessee*, 274 F.3d 377 (6th Cir. 2001) (holding that Nashville's ordinance licensing sexually oriented businesses in its definition of "sexually oriented" was in violation of the First Amendment).

Because the Amusement Taxes can impose a tax on a broad range of lawful expression, which would include numerous types of plays, musicals and other performances based purely upon their "content," they are overbroad and/or vague, and thus unconstitutional under the First Amendment of the United States Constitution.

The Court disagrees. The overbreadth doctrine is an exception to the general rule that a litigant only has standing to vindicate his own constitutional rights. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). It is premised on the assumption that some broadly written statutes or ordinances may have such a detrimental effect on free speech that they should be subject to challenge even by a party whose own conduct may be unprotected. *See Thornhill v. Alabama*, 310 U.S. 88 (1940); *Broadrick*, 418 U.S. 601. Inherent in this assumption is that the very existence of a statute or ordinance may cause others not before the court to refrain from otherwise constitutionally protected speech. *Id.*

Pooh-Bah assumes that the application of the Small Venue Exemptions hinge on the nature of the given performance rather than the nature of the venue at which the performance is conducted. In fact, the Ordinances exclude from the Exemption performances "conducted at adult entertainment cabarets." MCC § 4-156-010 and CATO. If a performance is conducted at an adult entertainment cabaret, it is excluded from the Exemption - so any business that is an adult cabaret knows that all of its performances are taxable. Conversely, if a performance is conducted at an ordinary small venue, it is exempt; the small venue can assume that all of its performances are exempt, regardless of their content. Thus, as a matter of law, performances of the musical "Hair," the play "Six Degrees of Separation," the opera "Salome," and the "Follies Bergere" are not excluded from the Exemption unless they are performed in an adult entertainment cabaret. All adult entertainment cabarets are treated the same and there is no real danger than the Ordinances will significantly compromise recognized First Amendment protections of parties not before the court. *See Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 799 U.S. 789, 801 (1982). Consequently this case is not a candidate for First Amendment overbreadth analysis. *Id.* at 801-02.

In addition, Pooh-Bah contends that the ordinances are vague. A vagueness challenge to an economic ordinance must be shown to be "impermissibly vague in all of its applications." *See*

*Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982). This is economic legislation where the only consequence of the legislation is whether or not a tax exemption will apply. The courts are substantially more tolerant of economic legislation because a business can be expected to consult relevant legislation in advance of action, and may clarify the meaning of the legislation by its own inquiry, or by resort to an administrative process. *Id.* at 498. In fact, "undeniably opaque" terms, which could raise substantial vagueness concerns if they appeared in a criminal statute or regulatory scheme, are tolerated when the "Government is acting as patron rather than as sovereign" because the "consequence of imprecision are not constitutionally severe." *Finley*, 524 U.S. at 588-89. Because there is "less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance," vagueness relating to the "amount of sexually explicit activity that may be portrayed," does not involve the "kind of threat to a free market in ideas and expression that justifies" adjudicating the hypothetical claims of persons not before the court in an overbreadth challenge. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 60-62 (1976).

Pooh-bah does not question that the Ordinances impose the tax on adult entertainment cabarets nor do they identify any terms of the Ordinance that are vague. In fact, the definitions used in the Adult Use

Ordinances, as referenced in the Small Venue Exemption, are almost identical to those found sufficiently definite in *Young*. *Id.* at 53. Like the ordinances at issue in *Young*, the Small Venue Exemption treats adult entertainment cabarets differently from other small venues, but it has no real and substantial effect on legitimate expression, and it is readily subject to a narrowing construction of the City/County and the courts.

The Court determines that the Amusement Taxes, through their Small Venue Exemption, do not violate the First and Fourteenth Amendment of the U.S. Constitution as being vague and/or overbroad.

In respect to issue four, Pooh-Bah contends that the Amusement Taxes, through their Small Venue Exemption, violate Article I, § 4, of the Illinois Constitution of 1970 on their face and as applied to Pooh-Bah. It argues that the free speech provision (Art. I, § 4) of the 1970 Illinois Constitution has been suggested as providing "greater protection to free speech than does its federal counterpart." *People v. DiGuida*, 152 Ill. 2d 104, 121 (1992). Pooh-Bah further argues even if the First Amendment was not violated, under Illinois' broader free speech protection, the content-based discrimination in the Amusement Taxes would still penalize Pooh-Bah's free speech rights, in violation of the Illinois Constitution. Because the Amusement Taxes are imposed on a broad range of lawful expression based on content, there can be no justification that will serve a compelling state interest,

under the higher free speech rights guaranteed under the Illinois Constitution.

Pooh-Bah contends that the "lockstep doctrine" has been rejected by Illinois courts as a guiding principle. *See People v. Washington*, 171 Ill. 2d 475, 485 (1996). Illinois courts have found that the Illinois Constitution provides broader protections than the United States Constitution. *See Rollins v. Ellwood*, 141 Ill. 2d 244, 275 (1990); *Van Harken v. City of Chicago*, 305 Ill. App. 3d 972, 982 (lst Dist.1999). To treat the Illinois free speech guarantee as a mere tag-along provision that has no practical effect and is only redundant with the First Amendment (and therefore of little purpose) was not the intention of the Sixth Illinois Constitutional Convention. It could have, but elected not to, parrot the First Amendment language. There must be significance to the new Constitution's more protective language. The Amusement Taxes, through their Small Venue Exemption, violate Article I, § 4, of the 1970 Illinois Constitution.

The Court disagrees with Pooh-Bah. Although the Illinois courts have, at times, construed provisions of the Illinois Constitution more broadly than their Federal counterparts, there is no precedent for doing so in this case.

In construing provisions of the Illinois Constitution, the courts apply the "lockstep doctrine." *People v. Levin*, 157 Ill. 2d 138, 159 (1993). This doctrine applies when a court attempts to determine

whether the framers had specifically intended the particular provision to provide broader protection than that available under an analogous provision of the United States Constitution. *See DiGuida*, 152 Ill. 2d 104. In doing so Illinois courts review the texts of both provisions as well as the debates and committee reports of the 1970 Illinois Constitutional Convention. *Id.* at 118. Unless the text and debates affirmatively show that the framers intended that a different construction should apply, Illinois courts will follow the precedent of the United States Supreme Court. *See People v. Tisler*, 103 Ill. 2d 226, 243 (1984); *DiGuida*, 152 Ill. 2d at 118; *People v. Benson*, 256 Ill. App. 3d 560, 566 (2nd Dist. 1994).

Given these standards, Pooh-Bah must show by convincing evidence that the framers intended to give greater tax benefits to adult entertainment cabarets under the Illinois Constitution that it would have under its Federal counterpart. *See People v. Emerson*, 189 Ill. 2d 436, 469 (2000) (stating that "defendant fails to offer a convincing reason why, in the context of death qualifications, this court's interpretation of state constitutional rights ... should differ from the Supreme Court's interpretation"). As a matter of law, Pooh-Bah cannot establish such intent in this case from either the text of the "free speech" provisions of both constitutions or the debates of the "free speech" provision of the Illinois Constitution.

The Illinois Constitution provides that all persons "may speak ... freely." *See* Ill. Const. 1970, art.

I, § 4. Similarly the United States Constitution prohibits laws "abridging the freedom of speech." *See* U.S. Const., amend. I. For the framers to have intended broader protection in the Illinois Constitution, the difference in the language of the State constitution must be one of substance, not merely form, as shown above. *See People v. Joyce*, 126 Ill. 2d 209, 214 (1988). In addition, the debates of the 1970 Constitutional Convention gave no indication that the framers intended a more expansive interpretation of the Illinois Constitution in the context of this case. Accordingly, there should be no departure from the lockstep doctrine in the instant case.

In any event, while the free speech provision of the Illinois Constitution "may" afford greater protection than the First Amendment, Pooh-Bah has cited no statutory language or debate at the Constitutional Convention or Illinois case indicating that the free speech provision of the Illinois Constitution in fact would afford it greater protection in the case at hand. Thus, United States Supreme Court precedent governs the case.

In respect to issue five, Pooh-Bah contends that Amusement Taxes, through their Small Venue Exemption, violate Article I, § 4, of the Illinois Constitution of 1970 as being vague and/or overbroad.

The Court disagrees with Pooh-Bah. Its complaint as to an Illinois violation is nearly parallel to its complaint under issue three and its briefs do not address the issue or any Illinois case law that would signal a different outcome. With no basis to depart from the lockstep doctrine, the Court determines the Small Venue Exemption does not violate Article I, § 4 of the Illinois Constitution of 1970 as being vague and/or overbroad.

Defendants Motions to dismiss are granted. Plaintiff's, Pooh-Bah's, motion for injunction is denied and its motion for summary judgment on the merits is denied.

ENTER: /s/_____
JUDGE Alexander P. White

[DATE STAMP]
JUDGE ALEXANDER P. WHITE
MAR 21 2003
CIRCUIT COURT - 241 HP

Cook County Amusement Tax Ordinance, § 3

A. Except as otherwise provided by this Section, an amusement tax is imposed upon the patrons of every amusement, which takes place within the County. * * *

* * *

D. The tax imposed in Subsection A of this Section shall not apply to or be imposed upon:

(1) The admission fees to * * * live theatrical, live musical or other live cultural performances that take place in any auditorium, theater or other space in the County, whose maximum capacity * * * is not more than 750 persons.

F. It is unlawful for any person to produce, present or conduct any amusement, without collection of the tax, except as provided in this Ordinance.

Cook County Amusement Tax Ordinance, § 2

"Amusement" means: any exhibition, performance, presentation or show for entertainment purposes, including, but not limited to, any theatrical, dramatic, musical or spectacular performance * * *.

* * *

"Live theatrical, live musical or other live cultural performance" means a live performance in any of the disciplines which are commonly regarded as part of the fine arts, such as live theater, music, opera,

drama, comedy, ballet, modern or traditional dance, and book or poetry readings. The term does not include such amusements as * * * performances conducted at adult entertainment cabarets (as defined in Article 14.21 of the Cook County Zoning Ordinance 76-0-15, as amended).

* * *

Cook County Zoning Ordinance 76-0-15, art. 14.21

* * *

ADULT ENTERTAINMENT CABARET

A public or private establishment which features topless dancers, strippers, male or female impersonators or other entertainers who:

A. Display or simulate the display of, "specified anatomical areas;"

* * *

SPECIFIED ANATOMICAL AREAS

A "specified anatomical area" is defined as:

A. Anatomical areas if less than completely and opaquely covered by a bathing suit, blouse, shirt, dress, pants, leotard or other wearing apparel or fabric.

1. Any portion of the genitals or pubic region.

2. Any portion of the buttocks.

3. Female breast(s) below a horizontal line across the breast at a point immediately above the top of the areola, including the entire lower portion of the female breast, but shall not include any portion of the cleavage of the female breast.

* * *

Municipal Code of Chicago § 4-156-020(A), (D)(1), (I):

A. Except as otherwise provided by this article, an amusement tax is imposed upon the patrons of every amusement within the city. * * *

* * *

D.(1) The tax imposed in subsection A * * * shall not apply to or be imposed upon the admission fees to * * * live theatrical, live musical or other live cultural performances that take place in any auditorium, theater or other space in the city whose maximum capacity * * * is not more than 750 persons.

* * *

I. It is unlawful for any person to produce, present, conduct, or resell tickets to, any amusement without collection of the tax, except as provided in this article.

Municipal Code of Chicago § 4-156-010:

For purposes of this chapter:

"Amusement" means: (1) any exhibition, performance, presentation or show for entertainment purposes, * * *.

* * *

"Live theatrical, live musical or other live cultural performance" means a live performance in any of the disciplines which are commonly regarded as part of the fine arts, such as live theater, music, opera, drama, comedy, ballet, modern or traditional dance, and book or poetry readings. The term does not include such amusements as * * * performances conducted at adult entertainment cabarets (as defined in Chapter 16-16 of this Code).

Municipal Code of Chicago § 16-16-030

"Adult entertainment cabaret" means a public or private establishment which: (i) features topless dancers, strippers, male or female impersonators; (ii) not infrequently, features entertainers who display "specified anatomical areas;" or * * *.

* * *

"Specified anatomical areas" means and is defined as:

1. Less than completely and opaquely covered: (a) human genitals, pubic region, (b) buttock and (c) female breast below a point immediately above the top of the areola; and

2. * * *.